No. 12,222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED,

Appellant (Defendant),

vs.

LESTER COLE,

Appellee (Plaintiff).

APPELLEE'S BRIEF.

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TOPICAL INDEX

PAGE

II.

III.

TABLE OF AUTHORITIES CITED

PAGE

PAGE

PAGE

STATUTES

TEXTBOOKS PAGE

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Statement of Jurisdiction.

Respondent adopts the statement of jurisdiction contained in Appellant's Opening Brief, pages 4 and 5.

Statement of the Case.

Introductory.

(1) This is an appeal from a judgment based on four special verdicts of a jury and on findings of fact and conclusions of law of the District Court. The verdicts were of course rendered independently of the findings; and the Court's determinations, while adopting the jury's verdicts, were based on the independent findings of the District Court. All of the verdicts and all of the findings of the Court were unanimously favorable to the plaintiff, appellee. The whole record, including the independent findings of the District Court, likewise favorable to the plain-

tiff, establishes that the judgment as a whole accomplishes substantial justice.

(2) The evidence overwhelmingly showed and it is not disputed that plaintiff was a loyal and conscientious employee who rendered, and who was rendering at the time of his suspension on December 2, 1947, excellent services as a writer for the defendant. The evidence showed that the defendant motion picture employer, as the result of a joint policy agreement reached in New York on November 25, 1947, with other motion picture employers, suspended plaintiff's contract and his compensation and denied to plaintiff the opportunity of seeking work elsewhere until plaintiff complied with impossible conditions, imposed by defendant, because of plaintiff's alleged acts and conduct while a witness before the House Committee on Un-American Activities on October 30, 1947.

The defendant employer contended that the acts and conduct of Mr. Cole before that House Committee violated the so-called "morals clause" of his employment contract. The nature of those acts and that conduct of Mr. Cole before that Committee was presented fully to the Court and to the jury. Recorded transcriptions of everything which Mr. Cole said and did as a witness, together with motion pictures taken while he was testifying before the Committee, were fortunately available and were exhibited to the Court and to the jury.

The jury unanimously found that none of plaintiff's acts or conduct was shocking or offensive or tended to shock or to offend; and that none of plaintiff's acts or conduct prejudiced or tended to prejudice the employer. The Court independently likewise so found. There was no proof that the employer had suffered any actual prejudice or financial loss as a result of anything the plaintiff did or said.

None of the motion pictures with which plaintiff was identified as the writer was picketed or boycotted, nor did defendant show that any exhibitor cancelled exhibitions thereof or threatened to do so. Instead the evidence showed that the defendant continued to distribute these pictures widely all over the world subsequent to the date when plaintiff's act is supposed to have "shocked" and "offended" the community and prejudiced the defendant employer.

Upon some theory that is as yet unclear, and without any showing of prejudice or injury, the employer now asks that the judgment of the Court and jury should be reversed and that Mr. Cole should continue to be blacklisted and economically destroyed—all because a group of motion picture employers met at the Waldorf Astoria Hotel and directed this particular employer to discharge or suspend this plaintiff because he dared claim a constitutional privilege when asked a question concerning his alleged political and trade union affiliations by a Committee of the Congress which had long publicly declared (and theretofore privately demanded of his employer) that Mr. Cole should be blacklisted by that private employer whom he had served faithfully and well. The answer unanimously given below by the jury and by the Court is the only answer consonant with our tradition of law and freedom.

(3) All of the facts point *unerringly* to the correctness of the decision of the Court and jury. As a matter of law, however, the judgment must be affirmed for under no circumstances may an employer exercise a right to suspend an employee without compensation, and without the right to work for another employer and, by imposing impossible conditions for relief from the suspension, deprive the employee of all right to earn a living forever or for

such time as the employer chooses. This was the precise right claimed by the employer here, and now sought to be vindicated by this appellant; it was, and it is, an unlawful claim of right.

(4) In the District Court some of the issues were submitted to the jury in the form of special interrogatories. In addition the Court made extensive findings of its own. The determinations of the jury in answering the special interrogatories were all favorable to the plaintiff. The findings of the Court likewise were favorable to the plaintiff. An affirmance even of less than all of the jury's verdicts requires an affirmance of the judgment because the verdicts provide separate and independent grounds for the judgment against the defendant, as will be disclosed more fully from the argument herein.

The Facts.

Appellee, Lester Cole, was employed by appellant, Loew's Incorporated, as a writer on a week to week basis early in 1945. His services were so satisfactory that in December, 1945, he was offered a term contract for a guaranteed period of two years at $1,150.00 a week, with options to Loew's for additional periods of two years each at successive increases in salary. [Stip'n. R. 77-78.] In that employment appellee wrote screen plays for the motion pictures, "Fiesta," "Romance of Rosy Ridge" and "High Wall." These motion pictures were distributed by his employer in 1947 and 1948; and appellee's services were considered excellent by his employer. [R. 303, 260.

In the Spring of 1947 the House Committee on Un American Activities sent representatives to Los Angeles They conducted a private hearing at which it was charge that appellee was a Communist, and it was urged that h be fired from the motion picture industry. This came t

the attention of appellant [R. 397], but despite this information, Cole was told by E. J. Mannix, vice-president and general manager of appellant, that *"The studio policy and mine in particular is* WE DON'T GIVE A DAMN WHAT PEOPLE WRITE OR SAY ABOUT MR. COLE'S POLITICS. We are concerned primarily with Mr. Cole as a craftsman and what he does for this studio . . ." [R. 397.][1] (Emphasis added.)

After the closed hearing by the House Committee in the spring of 1947, Eric Johnston, as spokesman for the motion picture industry, met with various motion picture executives, including the heads of Loew's Incorporated, and submitted a three point program to meet the demands of the House Committee. Point TWO of this program was the proposal that the motion picture industry refuse to employ "proven Communists." This proposal was unanimously rejected by the motion picture industry including Loew's Incorporated, because it would be a "potential conspiracy" and counsel for the industry "advised against it." [R. 810-811.]

Nevertheless the demands of the House Committee for the discharge of appellee and others continued. Late in

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[1]This was declared an official policy of the defendant with respect to its employment contract. It is of course the clearest possible admission by the appellant that the acts of the appellee now complained of, and the alleged reaction of the public thereto, were not acts or reactions of the kind included within the "morals clause" of the employment contract, nor proscribed thereby. This studio policy —"we don't give a damn what people write or say about Mr. Cole's politics."—stands in startling contrast to the belatedly conceived syllogism evolved by counsel for the appellant which formed the principal thesis of the appellant's whole case—*i. e.*, that "people believed Mr. Cole was a Communist because he did not disclose his political affiliation in answer to questions; that since he was believed to be a Communist, he was held in public scorn and contempt and thus prejudiced the employer, thereby violating the "morals clause." (See pp. 2-3 of Appellant's Opening Brief.)

the summer of 1947 two representatives of the House Committee, Smith and Leckie, called on Louis B. Mayer and E. J. Mannix, executives of appellant. Mayer and Mannix, separately and with different degrees of emphasis, told the respresentatives they were not concerned with Cole's politics, whatever they might be. In the words of Mr. Mannix adopted by Mr. Louis B. Mayer, the official position of the studio [R. 332, 441, 442], was given to the Committee as follows:

> "A. . . . They asked about certain people who worked for us.
>
> Q. Do you remember who they asked about? A. They asked about Dalton Trumbo. They asked about Lester Cole, and well, I said, 'I don't give a damn whether they are Communists or not.'
>
> Q. What did they ask you about? A. They wanted to know whether I knew if they were Communists, and I said, *'No, and I don't give a damn whether they are Communists or not. All I am looking for is getting people to write scripts for me, and my responsibility if he is a Communist or Democrat or Republican, that the ideology is not put on the screen, except entertainment is put there.* I assume that responsibility and I feel that it is in good hands right now because our record is very clear.'" [R. 289.] (Emphasis added.)

About the same time negotiations between Cole and Loew's were pending relative to an improvement in Cole's existing written employment contract. Cole had been promised a betterment of his contract if his work was satisfactory. There had been some delay in effecting the adjustment; and Cole notified his employer that if the demands of the House Committee and the reports concerning his political affiliations made Loew's unwilling

grant the adjustment, Cole was willing to terminate the contract and seek employment elsewhere. [R. 403, 438, 439.]

Loew's rejected Cole's proposal, and said that what the public thought about Cole's political affiliations was unimportant and whatever Cole's political beliefs were, was entirely his own business; that these were matters with which the studio was not at all concerned, and that the delay in effecting the adjustment was caused by a studio policy which required salary increases to be reviewed by New York executives. [R. 306, 401, 402, 403, 437, 438, 439.][2]

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[2]The evidence on this point is illuminating and undisputed. Negotiations looking to the upward revision of the existing contract were carried on by Mr. George Willner, Mr. Cole's agent, and by Mr. Cole personally. They discussed the matter of the delay in granting Mr. Cole a raise, together with the rumors and press reports concerning his political affiliations, with a number of studio executives, including Messrs. Vetluggin, Thaw, Cummings and Mannix:
(a) (Testimony of J. L. Cummings, Mr. Cole's immediate superior):

"A. I told Mr. Cole that I had talked to Mr. [Sam] Katz about getting an increase in salary. Mr. Cole, I might add, felt that he was entitled to an increase in salary and I thoroughly agreed with him. And on that basis, of his excellent work for me, the plans which we had for the future of making pictures —on that basis I went in and spoke to Mr. Katz.

Q. At about the time of these discussions between yourself and Mr. Katz, about the same time, there was called to your attention and you heard, did you not, of the claims that were being made concerning the alleged political activities of Mr. Cole? A. Yes; I had.

Q. After hearing the assertions made in the press and other places concerning Mr. Cole, you still felt, did you not, and so advised Mr. Cole, that he was entitled to have an upward revision of his contract? A. That is right. I don't know whether or not the article in the Hollywood Reporter came before or after that. I am not sure of the date.

Q. In any event, despite the rumors, you still felt and so advised Mr. Cole that you believed him entitled to an even

Finally tentative arrangements for bettering the terms of his then existing written contract were reached. It was tentatively agreed that Cole's position was to be greatly improved. Although the date for exercising the option to extend the contract for an additional two years had not yet been reached, Loew's agreed to exercise that option immediately. Thus Cole was guaranteed two additional years of employment beyond November 15, 1947. Furthermore instead of being guaranteed 40 weeks of employment in each year, the company agreed to obligate itself to give him 52 weeks of employment each year; other improvements in the contract included a six weeks paid vacation annually (none was given under the original contract), and the right to take six additional weeks leave without pay. [Pltf. Ex. 3.]

On September 19, 1947, Cole was served with a subpoena to appear as a witness before the House Committee.

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better contract than the one he then had, is that true? A. That is right." [R. 306.]

(b) (Testimony of George Willner):

"Q. And where did you see Mr. Vetluggin? A. I saw him in Mr. Vetluggin's office.

Q. And what was the conversation with Mr. Vetluggin? A. . . . And I also reminded Mr. Vetluggin or told him at the very same time there was an editorial and stories which were appearing in regard to Mr. Cole being a Communist, if I recall, an editorial by Mr. Billy Wilkerson of the Hollywood Reporter, in which Mr. Wilkerson said Lester Cole was a Communist; that he should be driven from the industry or he should be blacklisted. There many such stories and articles which appeared in the Reporter. There was one which concerned Mr. Cole and myself greatly, in which I think it was Mr. Thomas made the statement that all of these writers and supposed Reds, including Mr. Cole, would be driven from the industry within 60 days. I asked Mr. Vetluggin pointblank if these articles, these editorials and these rumors, which were current in the studio, were having their effect on the fact that this contract was not being negotiated, and Mr. Vetluggin told me that the studio policy was such that they were not con

The subpoena was actually served in the office of F. L. Hendrickson, who was head of the contract department at appellant's office. [R. 446.] Mr. Hendrickson was present while the service was made, and immediately afterward asked Cole to proceed to the business at hand, that is to say, to conclude the arrangements to better Cole's existing contract. Some three days later appellant forwarded to Cole a copy of the amendments to the contract, executed on behalf of appellant. [R. 448.]

Before leaving for Washington, Cole was asked by his immediate superior to take his story material with him so that he could work on it while he was away. Cole complied with this request and actually did work while he was in attendance in Washington. [R. 449-450.]

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cerned with what a writer did as far as politics were concerned. . . ." [R. 400-401.]

(c) (Testimony of George Willner):

"Q. Will you be good enough to tell us, in substance or effect, what you said to Mr. Mannix at that time and what he said to you? A. . . . The conversation carried along about 10 minutes along the lines of the possible direction by Mr. Cole, until we came to the point of Mr. Cole's politics. I said that Mr. Cole had told me that he was very concerned about the fact that possibly the studio was not improving his position at that time because of the fact there were many articles and editorials in the local trade papers, namely, the Hollywood Reporter, and that possibly the studio executives were taking that into consideration in not improving Mr. Cole's position. As near as I can recall Mr. Mannix' exact words, they were, 'The studio policy and mine in particular is we don't give a damn what people write or say about Mr. Cole's politics. We are concerned primarily with Mr. Cole as a craftsman and what he does for this studio.' He also said that Mr. Cole was a most loyal, most conscientious and most dependable craftsman, 'and we have only the highest regard for his ability.'

Q. Did he refer to him as loyal? A. Yes; extremely loyal.

Q. Do you remember that specifically? A. I do.

Q. Have you now told us substantially everything you recall about Mr. Mannix' conversation at that time? A. Yes. We left with Mr. Mannix saying he would see what could be done." [R. 396-397.]

The hearings commenced on October 20, 1947, and were suspended on October 30, 1947. Cole testified on the last day.

The attitude of appellant toward the hearings was publicly manifested in the following manner.

Eric Johnston, as spokesman for the motion picture industry including appellant, signed an advertisement which appeared in the Washington Post and in the New York Times on October 27, 1947, in effect excoriating the House Committee and its procedures. [Pltf. Ex. 6, R. 454.] Here are excerpts:

> "Too often, individuals and institutions have been condemned without a hearing or a chance to speak in self-defense; slandered and libeled by hostile witnesses not subject to cross-examination and immune from subsequent suit or prosecution. Legal counsel cannot be heard except at the committee's pleasure. Too often this protection is limited to advice on constitutional rights. The committee can accept or reject explanatory statements for the record.
>
> * * * * * * * *
>
> "Today the motion picture industry, a part of which I represent, is under investigation by the Committee on Un-American Activities of the House of Representatives. Its procedure, good and bad, is the common practice of all investigating committees. The present investigation serves to emphasize my thinking on the need for reform.
>
> "I am thoroughly aware that a Congressional investigation is a fact-finding inquiry and not a trial that a committee is neither a prosecutor nor a court that it neither indicts nor convicts. But in practice the committee becomes prosecutor, judge, and jury and the individual becomes the defendant.

"With no vested right to be heard and no vested right to challenge accusations against him, the innocent citizen is helpless. He can be indicted and convicted in the public mind on the unchallenged say-so of a witness who may be completely sincere, but can be either misinformed or riddled with prejudice. Without fear of reprisal, a prejudiced witness can exercise venom as well as veracity.

"The time to challenge an attack or a misrepresentation is at the hour it is made. The longer the delay, the greater the damage.

"In America, we hold that the individual is a higher power than the state which derives from him its own authority and must treat him accordingly. The sovereign rights and dignity of the individual supersede all else. There is no place in our society for any procedure or practice which cuts away part of those rights. There can be no such thing in America as a half-citizen.

* * * * * * * *

"One of the most precious heritages of our civilization is the concept that a man is innocent until he is proved guilty. This concept is so dear to us that we say it is better for twelve guilty men to escape than for one innocent man to suffer.

"This is in direct contradiction to the practice of the police state. In Russia, the state has all the rights, and the individual has none. There a man is guilty until he proves his innocence, and too often innocent men are condemned before a guilty one is found.

"We surround our defendants in courts of law with a multitude of protective devices. To name but a few—

"We assign them counsel when they cannot themselves afford it; they have the right of cross-exami-

nation; prospective jurors can be challenged; and the judge himself can be disqualified on grounds of prejudice.

"These protections and safeguards are denied or short-circuited in Congressional inquiries.

"I do not suggest that investigating committees adopt and pursue the procedure of the courts. We cannot expect the identical procedure of a court of law and accomplish the purpose of a Congressional investigation.

"I am suggesting only that there are too many weaknesses and evils in present procedure. I am proposing a fresh look as a basis for reform. Besides the right of the individual, there is another vital factor. Whenever a Congressional committee in its effort to expose or develop facts has injured an innocent individual, it has injured itself more. The entire institution of the Congress suffers. We arm the advocates of paternalism and the police state and undermine the legislative system.

* * * * * * * *

"Congress, the representative body of the people must be scrupulous in its relationship with the people and as an institution must be at all times above reproach.

"Today, the individual is crushed in many lands. The eyes of the people of the world who want liberty and freedom look to America as the last hope and the last refuge of free and dignified men.

"Congress must take positive action to re-emphasize the rights of man, the citizen.

"I earnestly appeal to you to initiate this needed reform at the next session of the Congress.

"/s/ Eric Johnston

Motion Picture Association of America, Inc. 1600 Eye Street, N. W., Washington 6, D. C.

This Advertisement Is Published as a Public Service

Paul V. McNutt, one of the attorneys especially employed for these hearings by the motion picture industry, held a press conference on October 22, 1947 [Pltf. Ex. 7], stating:

> "He said also that as a lawyer he would advise the industry to avoid concerted action to compile a blacklist of Communist writers, directors and other studio employes with the idea of denying employment to them.
>
> "Such action, he asserted, was without warrant of law and was not in accord with an announced policy of Congress or rulings of the Supreme Court, and, therefore, would involve the producers in serious legal difficulties." [R. 460.]

A day later McNutt told the press [Pltf. Ex. 8]:

> "Free speech is the foundation of the American Constitutional System. . . .
>
> "It does not require a law to cripple the right of free speech. Intimidation and coercion will do it. Fear will do it. Freedom simply cannot live in an atmosphere of fear. . . .
>
> "If the motion picture industry can be called before a committee and challenged on the content of the screen, then why not the newspaper, radio, magazine and book-publishing business? Will they be safe if some Congressional Committee is allowed to try to dictate and control the screen's content? Of course, they won't." [R. 461-462.]

On the same day Mr. McNutt declared himself [Pltf. Ex. 9] "shocked to see the violence done to the principle of free speech" during the hearing conducted by the House Committee at which Mr. Cole was later to be called to testify.

On October 27, 1947, Eric Johnston testified before the House Committee saying in positive terms that the motion picture industry would not blacklist anyone on the ground that he was a Communist. [R. 469-470.] Other press conferences and public statements were to the same effect. [R. 464.]

Mr. Cole was present in Washington from October 20, and was aware of these public utterances of his employer. Loew's Incorporated likewise knew Cole's attitude toward the hearings. On October 19, 1947, the evening before the hearings commenced, the attorneys for the motion picture employers met with Cole's attorneys and the attorneys of those who had been subpoenaed to testify. At this meeting Cole, through his attorneys, told his employer's counsel that he had given notice of a challenge to the House Committee's power to hold the hearings. The employer's attorneys were handed copies of a telegram stating various constitutional grounds of challenge and including this sharp attack:

> "The Committee does not have any lawful legislative purpose. Its sole purpose as exemplified by its acts and conduct is to stifle free thought and expression." [R. 412.]

At the conclusion of this conference Eric Johnston, as spokesman for the employers, gave his firm assurance that there would be no blacklist. [R. 409.]

Mr. Cole testified on October 30, 1947. The questions put to him by the Committee and his responses and his conduct while before the Committee were transcribed as they had originally occurred, onto a recording, and were played to the jury twice during the trial [Pltf. Ex. 14 R. 484]; and, while Mr. Cole was testifying before the Committee motion pictures of his appearance were made

and this film with sound was likewise exhibited to the jury. [Pltf. Ex. 15, R. 701-702.]

Maurice Benjamin, attorney for the employer, was present at the hearings from October 20-30, 1947. At no time did he give any instructions to Mr. Cole with respect to his conduct or actions toward the Committee. [R. 696.]

Prior to Cole testifying on October 30 and thereafter until November 27, 1947, there had been no intimation that his employment might be jeopardized in any way by his conduct in Washington. On the train returning from Washington he discussed the hearings with Mr. Mayer, head of the studio, and commiserated with him on the bad treatment the Committee had accorded him. [R. 362.] Among other things, Mayer told Cole it would have been better if he had answered the questions and had frankly told the public that he was or was not a Communist, whatever the fact was, and "that it was no crime," as Mr. Mayer saw it, "to belong to the Communist Party at the present time."[3] [R.362.]

Cole returned to work and rendered his customary services until December 2, 1947 (approximately a month after his testimony); for the week ending November 22, 1947, Mr. Cole was paid at the increased rate of compensation established by the amendment to his contract, and for the week ending November 29, 1947, he was likewise paid at this increased rate. [R. 695.]

On November 19, 1947, Mr. Eric Johnston, the president of the Motion Picture Producers Association, had

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[3](But it was at the later Waldorf Astoria meeting of the producers that a new condition of employment was imposed, one not heretofore required or contemplated, viz., the signing of a non-Communist affidavit.)

publicly declared on behalf of the producers, including Loew's Incorporated, that Mr. Cole may have had the authority to challenge the Committee as he did, and that the question was something which first had to be tested in the courts [R. 805-806], and that "one of the most precious heritages of our civilization is the concept that a man is innocent until he is proved guilty." [R. 806.] On December 2, 1947, Loew's Incorporated knew that no charges had been made in any court against Mr. Cole [R. 808]; nor had he as at the date of the trial ever been found guilty of any offense. [R. 859-862.][3a]

On November 24, 1947, a conference of motion picture executives was held at the Waldorf Astoria Hotel in New York City. The meeting lasted three days. As a result of strong pressures exerted by Eric Johnston, there came out of this meeting the so-called joint policy statement [R. 795] pledging joint action by all motion picture employers to blacklist a group of persons, including plaintiff, who testified before the House Committee:

> "We will forthwith discharge or suspend without compensation those in our employ, and we will not re-employ any of the ten until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist." [R. 795.]

[3a]The alleged offense, contempt of Congress, is a misdemeanor (2 U. S. C. 192.) As is said in *Sinclair v. U. S.*, 279 U. S. 263 at page 298, 13 L. Ed. 688, 49 S. C. 268: "The gist of the offens is refusal to answer pertinent questions. *No moral turpitude i involved.*" (Emphasis added.)

Mayer and Mannix, West Coast executives for Loew's, went along with the statement of policy with obvious reluctance. It is plain inference from the testimony of these executives that Cole was suspended only because of the coercive effect of the joint policy statement. [R. 339, 340.][4]

On December 2, 1947, over a month after giving his testimony, Cole was handed the notice of suspension. Loew's continued and now continues to distribute the films written by plaintiff; these films advertise upon their face

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[4]The circumstances surrounding the giving of the notice of suspension were these: Mr. Mannix called Mr. Cole on the morning of December 2, 1947, stating: "Lester, I want you to know there is nothing personal in what I am going to do now but I am sending you by registered mail a notice of your suspension." He (Mr. Mannix) repeated: "You know that this has nothing to do with me. It is not personal. But I am told to do it and I am doing it."

"And I (Mr. Cole) replied that he might not feel it was personal but, if he could convince my kids that it wasn't personal, that would be better; that I couldn't feel it that way; that he had promised me months before that he didn't give a damn what my alleged political associations were as long as I performed my work ably, and that I considered, in sending me this suspension, it was a personal betrayal." [R. 490.]

Mr. Mayer testified on the matter of the giving of the notice of uspension as follows:

"Q. Isn't it a fact that your action that was taken was taken as a result of and pursuant to the policy which was adopted on November 26, 1947, at this meeting in New York City, at the Waldorf-Astoria Hotel? A. That was agreed upon at that meeting but my instructions came from our own officers.

Q. To follow out that policy, isn't that correct? A. They said, 'We are not firing him. We are suspending him until he is proven guilty or innocent of contempt.'

Q. But their instructions were given pursuant to that policy, which Loew's was a party to, and in order to follow out and effectuate the policy at that meeting, isn't that correct? A. It was given at that meeting." [R. 339.]

the name of plaintiff as their writer. [R. 866.][5] Such pictures were not picketed nor boycotted nor did defendant offer any proof of any loss of continued revenues from such pictures by reason of plaintiff's identification with them as their writer. Since the date of his suspension Mr. Cole has been ready and willing to render his services for Loew's. [R. 490.]

The Pleadings.

The complaint for declaratory relief, besides alleging the written contract of employment, the notice of suspension, and the controversy between the plaintiff and defendant, also alleges that the plaintiff will be irreparably injured in that "by reason of said purported suspension plaintiff is required to refrain from seeking employment elsewhere and is required to remain uncompensated and unemployed and is prevented from finding gainful employment in the motion picture industry and is prevented

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[5](a) With respect to the picture "High Wall," on which Mr. Cole received credit as the writer, that picture was released on February 2, 1948, and was exhibited in 11,983 theatres.

(b) The picture "Fiesta" upon which Mr. Cole received credit as a writer, was first released on July 18, 1947. Between July 18, 1947, and December 8, 1948, it was shown in 14,365 theatres. Between October 30, 1947, and December 2, 1947, it was shown in 871 theatres, and from December 2, 1947, to December 8, 1948, it was shown in 2,365 theatres.

(c) The picture "Romance of Rosy Ridge" on which Mr. Cole received credit as a writer has been shown in 14,149 theatres; in the five weeks between October 30, 1947, and December 2, 1947, it was shown in 1,730 different theatres and between December 2, 1947, and December 8, 1948, it was shown in 3,206 separate theatres. [R. 866-867.]

from writing and selling any literary material to any other motion picture producer, publisher or theatrical producer." [R. 5-6.]

The contract of employment, attached to the complaint, contains the following provisions:

> "3) The employee expressly agrees that he will render his services solely and exclusively for the producer throughout the term hereof and that during said term he will not render services of any kind or nature whatsoever either to or for himself or to or for any person, firm or corporation other than the producer, without the written consent of the producer first had and obtained." [R. 8.]

> "11) . . . The employee hereby expressly agrees that the producer shall be entitled to injunctive and other equitable relief to prevent a breach of this agreement by the employee . . . In the event of the failure, refusal, or neglect of the employee to perform his required services or observe any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at his option, . . . may refuse to pay the employee any compensation for and during the period of such failure, refusal or neglect on the part of the employee, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues. . . . Each and all of the several rights, remedies and options of the producer contained in this agreement shall be construed as cumulative and not one of them as exclusive of the others or of any right or remedy allowed by law." [R. 17-19.]

"12) . . . During the period of any such suspension . . . the employee shall not have the right to render his services to or for any person, firm or corporation other than the producer without the written consent of the producer first had and obtained." [R. 20.]

"5) The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general."

After answer by the defendant the plaintiff moved for a judgment on the pleadings, contending that no issue of fact remained to be tried. [R. 220.] The motion was denied. [R. 232.]

Thereafter the District Court made its pre-trial order [R. 77-85], including the following:

"IV.

"Nothing in this order contained shall be a determination or finding contrary to plaintiff's contention herein that there are no issues of fact to be tried or that any of the issues of fact heretofore in . . . set out is in reality an issue of law."

Summary of Argument.

I. JUDGMENT SHOULD HAVE GONE FOR APPELLEE AS A MATTER OF LAW.

(a) UPON THE WHOLE RECORD IT IS CLEAR THAT THE VERDICT AND JUDGMENT WERE CORRECT.

(b) THE ATTEMPTED SUSPENSION WAS INEFFECTIVE BECAUSE THERE WAS NO RIGHT TO SUSPEND FOR A VIOLATION OF THE MORALS CLAUSE.

(c) THE LANGUAGE OF THE CONTRACT, AND THE CONTEMPORANEOUS CONSTRUCTION OF THE CONTRACT BY THE PARTIES, SHOWS THAT POLITICAL CONDUCT WAS EXEMPTED FROM THE MORALS CLAUSE.

(d) APART FROM THE VERDICTS, THE UNDISPUTED EVIDENCE REQUIRED JUDGMENT FOR THE PLAINTIFF FOR THERE WAS NO RIGHT TO SUSPEND AT THE DIRECTION OF A COMBINATION OF EMPLOYERS.

(e) IN ANY AND ALL EVENTS THE CONDITIONS IMPOSED BY APPELLANT FOR RELIEF FROM SUSPENSION RENDER THE SUSPENSION VOID.

II. THE INSTRUCTIONS WERE FREE FROM ERROR AND IN ANY EVENT NO PREJUDICE TO APPELLANT IS SHOWN.

III. THE TRIAL COURT'S RULINGS ON EVIDENCE WERE FREE FROM ERROR.

IV. THE AFFIDAVIT TO TRANSFER THE CAUSE DID NOT DISCLOSE ANY PERSONAL BIAS OR PREJUDICE OF THE TRIAL COURT AND WAS INSUFFICIENT.

ARGUMENT.

I.

Judgment Should Have Gone for Appellee as a Matter of Law.

(a) Upon the Whole Record It Is Clear That the Verdict and Judgment Were Correct.

The short answer to appellant's position is this:

(1) The employer in construing the meaning of this contract and the meaning of the effect of the public discussion of Mr. Cole's alleged political affiliation, declared that it did not "give a damn" what people wrote or said about those political affiliations; and, despite press clamor and congressional demand for Mr. Cole's discharge, the employer bettered the terms of his then existing written contract. Its interest was in Mr. Cole's work as a screen writer, not with his alleged political unorthodoxy, his manifestations thereof or the public reaction thereto. At a minimum, this makes completely untenable the claim now made that the morals clause was violated because of that asserted public reaction to Mr. Cole's failure to responsively declare to the Committee what those affiliations were. This for the reason that the best proof of the meaning of a contract is its practical construction by the parties.

See:

4 Cal. Jur. Supp., discussion, pages 133, 134;

3 *Williston on Contracts,* Section 623;

Mitau v. Roddan (1906), 149 Cal. 14, 84 Pac. 145, 6 L. R. A. (N. S.) 275;

Holman v. Musser (1922), 59 Cal. App. 734, 21 Pac. 33;

Coast Counties Real Estate & Inv. Co. v. Monterey County Water Works (1929), 96 Cal. App. 269, 274 Pac. 415;

Katz v. People's Finance & Thrift Co. (1929), 101 Cal. App. 552, 281 Pac. 1097;

Work v. Associated Almond Growers (1929), 102 Cal. App. 232, 282 Pac. 965;

Storm & Butts v. Lipscomb (1931), 117 Cal. App. 6, 3 P. 2d 567;

Hansen v. D'Artenay (Geldberg) (1932), 121 Cal. App. 746, 9 P. 2d 889;

Herrlein v. Tocchini (1933), 128 Cal. App. 612, 18 P. 2d 73;

Skousen v. Herz (1933), 135 Cal. App. 116, 26 P. 2d 498;

Carstens Packing Co. v. Miller (1935), 10 Cal. App. 2d 48, 51 P. 2d 161;

Weaver v. Grunbaum (1939), 31 Cal. App. 2d 42, 87 P. 2d 406;

Swarthout v. Gentry (1943), 62 Cal. App. 2d 68, 144 P. 2d 38;

Union Sugar Co. v. Hollister Estate Co. (1935), 3 Cal. 2d 740, 47 P. 2d 273;

Roy v. Salisbury (1942), 21 Cal. 2d 176, 130 P. 2d 706, on hearing after 49 A. C. A. 270, 121 P. 2d 109;

California Pack. Corp. v. Grove (1921), 51 Cal. App. 253, 196 Pac. 891;

Nicolaysen v. Pacific Home (1944), 65 Cal. App. 2d 769, 151 P. 2d 567.

The proof on this point is clear; it established that the acts now complained of were not acts of the kind which gave rise to the right to claim a violation of the morals clause. In addition, it established the norm of performance required by the employer and rendered performance by the employee in a different degree unnecessary. (See particularly *Carpenter v. Norcross,* 204 Fed. 537; *Child v. Boyd,* 175 Mass. 493, 56 N. E. 608; *Herbert v. Wood,* 185 N. Y. Supp. 325, 113 M. 671.)

In fact therefore the Court's instructions to the jury were much more favorable to the defense than the undisputed facts required.

(2) The evidence showed that the employer challenged the conduct of this Committee in this particular Hollywood investigation, (a) by sharply worded ads placed in newspapers of national circulation "as a Public Service"; (b) by public statements made by its counsel in the press and over national radio hook-ups, asserting that the particular investigating committee was trying to "dictate and control the content of the screen." The employee on the other hand challenged the conduct of this committee by asserting that the Bill of Rights to the Federal Constitution protected a citizen's political belief and affiliation against compulsory disclosure at the command of a legislative committee.

In America it has never been considered immoral or obscene to assert in one form or another the existence of certain claimed private rights and privileges (both individual and corporate) even as against the counter-assertion by the Congress that such rights and privileges do not in fact exist. "In democratic countries, it is not only the right but the duty of every citizen to review and complain of official misconduct, to criticize existing laws, t

favor or oppose changes, and to petition for redress of grievances." (Patterson, Free Speech and a Free Press, p. 7.)

And one who raises a constitutional right to be free from legislative inquiry into his political affiliation is not thereby committing any act involving "moral turpitude," (*Sinclair v. U. S., supra*), nor is the act *malum in se.* Indeed the rationale justifying such challenge to officialdom is spelled out by the principle that "The right of association appears to be almost as inalienable in its nature as is the right of personal liberty. No legislator can attack it without impairing the foundations of society." (*de Tocqueville, Alexis,* Democracy in America, Vol. I, p. 196.) And see the Opinion of the Supreme Court in *West Virginia v. Barnette,* 319 U. S. 624, 642, 87 L. Ed. 1628, 63 S. C. 1178:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be *orthodox in politics,* nationalism, religion or other matters of opinion, *or force citizens to confess by word or act their faith therein."* (Emphasis added.)

Of course, one might disagree with the method selected by Mr. Cole to challenge this claimed authority, just as one might disagree with Mr. Johnston's ad excoriating the Committee or with Mr. McNutt's sharply worded comments. But such disagreement is the well-spring of the democratic way of life—it is not a shocking or offensive act as contemplated either by the contract or by any reasonable standards for judging human conduct. Reasonable persons might disagree with all the methods chosen to challenge the claimed authority to investigate the content of the screen and the content of the minds of those who

write for the screen. But the contract of the parties does not provide that Mr. Cole's employment was to be forfeited if he did an act with which others disagreed. The morals clause deals with acts which "shock" and "offend" public morals and conventions. Political differences, however strong, are not of that class in the sense used in the contract or by the parties.[6]

And finally of course at the time of the service of the notice of suspension, no charge of any kind had been filed in any court against Mr. Cole and at the time of trial he had not been found guilty of any offense by any court. (This is still true as of the time of the filing of this brief.)

Fortunately here recorded transcriptions of every word said by Mr. Cole while a witness before the Committee were available and were heard by the jury twice. Motion pictures taken while he was before the Committee and showing his exact conduct were likewise exhibited to the jury. It unanimously concluded that nothing Mr

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[6]Our contemporary history is replete with instances where both individuals and corporations like this appellant have challenged claimed authority by asserting it to be unconstitutional and by seeking court tests to determine the constitutionality of the official acts. The challenges of the Wagner Act and the National Labor Relations Board are examples. In this case there was no effrontery or contemptuous challenge to a settled law. In fact, the conduct of the un-American Activities Committee in these very hearings has been seriously questioned on constitutional grounds by scholars of great repute in the leading law periodicals of our country. See 46 Mich. L. Rev. 521; 47 Mich. L. Rev. 191; 33 Cornell L. Q. 565; 17 Univ. of Cincinnati L. Rev. 264; 14 Univ. of Chicago L. Rev. 256; 6 Harvard L. Rev. 592 ("Loyalty Tests and Guilt by Association," John Lord O'Brien); 43 Ill. L. Rev. 253; 60 Harvard L. Rev. 1193 ("Report on a Report of the House Committee on Un-American Activities"). Walter Gellhorn; 47 Col. L. Rev. 416; 37 Georgetown L. Journal 104; 1 Baylor L. Rev. 212; 2 Rutgers Q. Law Rev. 125; 27 Neb. L. Rev. 608; 26 Texas L. Rev. 816; 15 Univ. of Chicago L. Rev. 544 ("Letter to President from Yale Law School Faculty"); 34 A. B. A. J. 15; 22 So. Cal. L. Rev. 46

Cole did, as charged in the notice of suspension, was shocking or offensive, or degrading, nor did it have the tendency to shock or offend or degrade, nor did it expose or tend to expose him to public hatred, contempt, scorn or ridicule or prejudice or tend to prejudice the producer. And the producer offered no competent evidence to show the conduct complained of had that claimed effect.

Under the circumstances therefore the verdict of the jury and the independent judgment of the Court comported with substantial justice; upon the whole record it is apparent that no injury could have resulted from any claimed error in the course of the trial, and therefore the appeal must be affirmed. (See *Carlisle v. Sandeagle,* 259 U. S. 255, 66 L. Ed. 927, 42 S. Ct. 510; *Sun v. Vinton,* 248 Fed. 263; *Hornblower v. City of Pierre,* 241 Fed. 450.)

(b) The Attempted Suspension Was Ineffective Because There Was No Right to Suspend for a Violation of the Morals Clause.

A right to suspend an employment does not exist under general law, nor may it be derived by implication. If it exists at all, it exists by reason of express provisions of a contract. In seeking to exercise a right to suspend, appellant was seeking to exercise what it believed was a right under the contract, and in so doing it affirmed the continued existence of the contract.

The clause in the contract from which the right to suspend is sought to be derived is:

> "In the event of the failure, refusal or neglect of the employee to perform his required services or ob-

> serve any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at its option, . . . may refuse to pay the employee any compensation for and during the period of such failure, refusal or neglect on the part of the employee, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues." [R. 17-18.]

What is the effect of a suspension under this clause?

First: The employee is not permitted to work for the employer, and the employer will pay him no salary. [Contract Article 11, R. 17.]

Second: The employee may not work for anyone else. [Contract Article 12, R. 19-20.]

Third: The producer may extend the term of the contract for the term of the suspension. [Contract Article 11, R. 17; Contract Article 12, R. 19.]

Fourth: The employer is expressly given the right to have an injunction to prevent any violation by the employee. [Contract Article 11, R. 17.]

Thus during suspension the employee can gain no livelihood, nor can he wait out the duration of the contract.

Appellant, contending that Cole had violated the so called "morals clause" [Contract Article 5, R. 12], purported to suspend him under the provisions of Contract Article 11, quoted above.

Appellee contends:

(a) There is no right to suspend for a violation of the "morals clause."

(b) The language of the contract shows, and the contemporaneous construction of the contract by the parties shows, that political conduct and the effect of the public reaction thereto were exempted from the "morals clause."

(c) A right to suspend at the employer's discretion is not the same as a right to suspend in compliance with contract with a combination of employers.

(d) In any and all events the conditions imposed by appellant for relief from suspension render the suspension void.

(a) There can be no suspension for a violation of the "morals clause." We direct attention first to the fact that Article 8 of the agreement specifically gives the producer the right to suspend for the employee's incapacity; Article 9 likewise gives the producer the right to suspend if its operations are impeded by *force majeur*.

Neither of these articles is pertinent except to illustrate the difference in language used in Article 11. This article does not use the word "suspend"; it gives the employer the right to refuse to pay compensation.

The right to refuse to pay compensation is, of course, the right to apply economic pressure in order to assure the employer that he will have performance by the employee in accordance with the employee's undertakings. What is contemplated by Article 11 is a breach of a continuing nature. This is manifested by the use of such language as the employee's "failure, refusal or neglect." The language is aimed at *inaction* rather than malfeasance. It

cannot deal with a case where the employee commits a single affirmative act constituting a breach, unless there is something which the employee has the obligation and the power thereafter to do in order to remedy the breach.

Thus a reading of Article 11, having in mind the contrasting language of Articles 8 and 9, and having in mind the practical ends to which the contract must be aimed, leads only to the conclusion that the right to refrain from making payments of compensation may be exercised only in those situations in which it lies within the power of the employee to remedy his breach. Otherwise, the right to suspend payment, and to continue to extend the contract for the period of suspension in a case in which it is beyond the power of the employee to remedy the situation, would give the employer the right to remove the labor and talent of his employee from the market forever.

(c) The Language of the Contract, the Contemporaneous Construction of the Contract by the Parties and the Public Policy of the State of California Show That Political Conduct Was Exempt From the Morals Clause.

Statutory law, so far as relevant to a contract, is deemed to be written into it. (*Stockton Savings Bank v. Massanet,* 18 Cal. 2d 200, 206, 114 P. 2d 592; *Guardianship of Oumjuian,* 4 Cal. 2d 659, 661, 52 P. 2d 220; *Mott v Cline,* 200 Cal. 434, 446, 253 Pac. 718.)

California Labor Code, Sections 1101, 1102 and 1103 forbids the use by an employer of the employment relationship to control or even to influence the political action or activity of his employees. And this language of the Labor Code has been held to be imported into contracts of employment, so as to permit a suit by an employee against his employer on the contract of employment where the

employer violates these provisions. (*Lockheed v. Superior Court,* 28 Cal. 2d 481, 486, 171 P. 2d 21, 22.)

Furthermore as if to make this contention explicit, Article 15 of the Contract [R. 22] provides that whenever there is any conflict between any provision of the agreement and any statute, the latter shall prevail, and the agreement shall be curtailed to the extent necessary to bring it within the legal requirements.

Reading the morals clause with Article 15 of the contract and with the Labor Code, the conclusion is compelled that the general language of the morals clause was not intended to include conduct in the field of politics. Appellant itself construes Cole's conduct as being political in its argument based on the attitude of the public toward Communists, although this argument is founded on narrow colloquial usage of the word. The Labor Code being a remedial statute and designed to effect a beneficent social policy should be construed broadly rather than narrowly. There can be little doubt that Cole's conduct was "political" in the highest sense of the word. [Cole's conduct before the Committee asserted what he believed to be the rights of a citizen with relation to his government.] For example of the use of the word "politics" as a course or line of activity consistent with a theory of political philosophy see Section 1 of the California Political Code defining the contents thereof; Lindsay Rogers, in the Encyclopedia of the Social Sciences, Volume VI, page 24, saying that politics embraces the relations between the State and the individual and in this sense is practically synono-

mous with political philosophy; see *In re Kemp,* 16 Wisc. 382, at 419; *Norton v. Letton,* 111 Southwestern 2d 1053, 1057, 271 Ky. 353. See also *Fisher v. Masters,* 83 P. 2d 212, 217, 29 Cal. App. 2d 66, 67; *Commonwealth v. McCarthy,* 85 A. L. R. 1141, 1144, 183 Northeastern 495, 281 Mass. 261; *People Ex. Rel. v. Morgan,* 90 Ill. 558, 562; *Dorsett v. State,* 289 Pac. 298, 304, 106 Cal. App. 416; *United States v. Wurzbach,* 31 F. 2d 774; *Friendly v. Olcott,* 123 Pac. 53, 56, 61 Ore. 580; *Lucker v. Curtis,* 136 P. 2d 978, 983, 64 Ida. 498; *Blackman v. Stone,* 17 Fed. Supp. 102, 107.

And it is axiomatic that the best test of the meaning of the language of a contract is to be found in the practical and contemporaneous construction of it by the parties themselves. Here there can be no doubt at all that the defendant did not consider either Mr. Cole's alleged political unorthdoxy, or the public reaction thereto to be matters within the sweep of the morals clause. At the very time when this same House Committee was demanding Cole's discharge because of his alleged affiliations and at the very time that public excitement was high with respect thereto, this employer, by its repeated declarations showed it never believed that the morals clause of it contract embraced any of the matters which it now relies upon as the purported justification for this violation by i of the employment agreement. Its own construction o its terms belies the whole argument and reveals it fo what it essentially is—a belated attempt to excuse the in excusable.

(d) Apart From the Verdicts, the Undisputed Evidence Required Judgment for the Plaintiff, for There Was No Right to Suspend at the Direction of a Combination of Employers.

The power to suspend or to refuse to pay salaries is a delicate power. Even in the most obvious cases it verges on the border of what should not be permitted under sound public policy, because it deprives an employee of the opportunity to make a living and deprives the public of the fruits of the employee's labor. In this case the public would lose the benefits of the creative efforts of an established writer. Under these circumstances, the right of an employer to suspend should be narrowed to its legitimate ends.

In the present case the undisputed evidence showed clearly that Loew's, in suspending, was not acting under its own discretion but was acting under the coercive effect of a combination of motion picture producers. [R. 39.] A proper construction of the morals clause and the employment contract as a whole should forbid such a suspension.

> "The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."
>
> *Truax v. Raich,* 239 U. S. 33, 38, 60 L. Ed. 131, 36 S. C. 7.

And in the same case it was said:

> "The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others."
>
> 239 U. S. 38.

See, also,

DeMarais v. Stricker, 152 Or. 362, 53 P. 2d 715.

The last cited case distinguishes between the free exercise of a right to terminate by an employer and a termination which is caused by improper interference of others.

(e) In Any and All Events, the Conditions Imposed by the Employer Were Such as to Render the Purported Suspension Void.

The notice of suspension advised Cole that the suspension would continue until (1) Cole had been acquitted or purged of contempt; and (2) he declared under oath he was not a Communist.

It is obvious that appellant did not have the power to impose these conditions. Nothing in the contract gives to the employer the right to demand any of these acts on the part of appellee, and the power to suspend is given only for the purpose of compelling performance of those duties undertaken by the employee, not additional duties.

Every contract by which one is restrained from engaging in a lawful profession is void, unless the case falls within one of the recognized exceptions, as in the case of a sale of good will. Every contract which forbids or to practice a lawful profession for an indefinite period of time is automatically void. (*Business and Professions Code* 1660 (formerly Civil Code 1673); *More v. Bennett* 40 Cal. 251; *Wright v. Rider,* 36 Cal. 342; *Callahan*

Donnally, 45 Cal. 152; *Hunter v. Superior Court,* 97 P. 2d 492, 36 Cal. App. 2d 100; *Getz Bros. & Co. v. Federal Salt Co.,* 81 Pac. 416, 147 Cal. 115; *Vulkan Powder Co. v. Hercules Powder Co.,* (31 Pac. 581), 96 Cal. 510; *Martin v. Hawley,* 50 S. W. 2d 1105; *Wisconsin Ice and Coal Co. v. Lueth,* 213 Wis. 42, 250 N. W. 819; *Summitt Baking Co. v. Bahrehns,* 251 N. W. 826, 125 Neb. 718, 251 N. W. 826; *Supermaid Cookware Corp. v. Hamil,* 50 F. 2d 830, certiorari denied 284 U. S. 677, 76 L. Ed. 572, 52 S. C. 138; *Walker Coal and Ice Co. v. Westerman,* 263 Mass. 235, 160 N. E. 801; *May v. Lee,* 28 S. W. 2d 202.)

Furthermore, the demand that Cole state on oath that he is not a Communist cannot be made a condition of suspension. Waiving for the moment the question whether it might be made a ground of termination, it is obvious that to suspend an employee until he shall declare under oath he is not a Communist might conceivably deprive him of the right to earn a living; for if a man were a Communist (which this employer had previously repeatedly said was of no concern to it), he could not work for Loew's Inc. nor for any other employer unless he were willing (1) to perjure himself or (2) to change his private political belief to suit his employer.

Appellee insists however that the imposition of this condition was beyond the powers of the employer. It is in direct contravention of California Labor Code Sections 1101, 1102 and 1103.[7] (*Lockheed Aircraft Corp. v. Superior Court. supra.*)

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[7]Section 1102 provides:

"Coercing or Influencing Political Activities of Employees. No employer shall coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

Should the employment contract conceivably be subject to a construction which would permit the employer to control his employee's politics, that construction must needs be avoided unless (which is not the case here) no other construction is possible. Any contract by which one is given power to determine the political conduct of another would be void. (*Restatement of Contracts,* Section 567.)

Contracts which tend to influence the political integrity of the citizen by means of offers of financial benefit are void. (*Martin v. Wade,* 37 Cal. 168; *Newell v. Purdy,* 36 Wis. 213; *Spayd v. Ringing Rock Lodge,* 270 Pa. 67, 113 Atl. 70; *Nichols v. Mudgett,* 32 Vermont 543.)

The condition stated in the notice of suspension, that Cole purge himself of contempt, requires Cole to do the impossible. There is no provision for purging oneself of contempt of Congress.

Furthermore the alternative, that Cole be acquitted of contempt was beyond the power of the employer to exact. Although it cannot be doubted that Cole would seek to be acquitted, it did not lie within his power to determine whether he would or would not be acquitted. Furthermore, does the inclusion of this condition mean that if Cole is not acquitted, but is convicted, the suspension goes on forever?

For each of the reasons asserted, the suspension must be held to be void.

If the Court agrees with the foregoing, the appeal is disposed of. The asserted errors in the District Court's instructions and rulings on evidence are then immaterial because no issue of fact is presented.

II.

The Instructions Were Free From Error and in Any Event No Prejudice to Appellant Is Shown.

Appellant's argument (Appellant's Brief pp. 68-69) that one first in default cannot enforce a contract is an incomplete statement of a principle not applicable to the present appeal. The principle urged by appellant is valid in a case in which one has been guilty of a breach giving rise to a right to terminate the contract, and the other on being sued for his own default elects to assert the plaintiff's prior breach as a defense. But in the case at bar, appellant, far from terminating the contract, has purported to suspend appellee, and thus to assert a right under the contract itself. Appellant's argument therefore amounts to saying that appellant may look to the contract to derive a benefit from it, but appellee may not do so. That is not the law. One who acts in recognition of the existence of a contract is himself bound by it. (*United States Potash Co. v. McNutt,* 70 F. 2d 126 (C. C. A. 10, 1934); 17 Corpus Juris Secundum 929; *Goudal v. DeMille Pictures,* 118 Cal. App. 407, 5 P. 2d 432.)

The effect of the foregoing principle is that appellant cannot rely on any breach or default by Cole as a defense to this action. Having elected not to terminate the contract but to assert a right which depends on the continued existence of the contract, appellant must rely on the effectiveness of the suspension.

The jury's determinations and the Court's findings each support the judgment, and therefore the claimed errors regarding instructions, even if found to exist, are without substance.

Although at the time of answering the appellant requested a jury trial on all of the issues, appellant receded

from this position and submitted requests for special verdicts pursuant to Rule 49(a). [R. 131, *et seq.*] The gist of the proposed special verdicts would have submitted to the jury the determination of whether Cole had violated the morals clause of his employment contract. The appellant submitted five such interrogatories, each asking whether the appellee had committed a specifically described act which, if found in the affirmative, would have constituted a breach of his employment contract. The Court gave the substance of these interrogatories to the jury, although it reduced the number to three. [R. 919.]

In addition to the special interrogatories requested by appellant, the Court submitted an interrogatory relating to waiver, the substance of which was requested by the appellee. [R. 920.]

All of these interrogatories were answered favorably to the appellee. This is to say that the jury found, first, that the appellee had not violated his employment contract and, second, that if he had, the conduct of the appellant constituted a waiver of the right to act on the breach. It is important to observe that these two determinations overlap. Even if only one stands, the judgment must be affirmed. If there has been no breach by the appellee the purported suspension was ineffective. And even if there had been a breach, Loew's had waived the right to suspend, and its subsequent purported suspension could only be ineffective.

It should further be observed that although it was the appellant who initiated the request for special verdicts the appellant at the same time requested instructions which would have been appropriate only to the submission

to the jury of a general verdict. [See for example defendant's requested instruction No. 7, R. 128-129.][8]

It is, however, important to bear in mind the fact that the jury was not requested to return a general verdict. The jury's duties were limited to answering the four special interrogatories. Accordingly, error alleged to exist in the charge to the jury is not worthy of consideration on this appeal unless it can also be shown that the error prejudicially affected the jury in determining the interrogatories submitted to it. (*Roller v. Kling,* 150 Ind. 159, 49 N. E. 948; *Woolen v. Wire,* 110 Ind. 251, 11 N. E. 236; *Board of Commissioners v. Bonebrake,* 146 Ind. 311, 45 N. E. 470.)

The Reference to the Law of Libel Was Carefully Directed to the Issue Submitted to the Jury.

The gist of appellant's argument under Specification of Error No. 12 (Appellant's Brief pp. 70 *et seq.*) is that the instructions relative to libel were abstract and irrelevant. The argument is unfounded. The language of the instruction selected by appellant for quotation in the brief does not fairly represent the charge, as we shall show. As given, the instruction itself was pertinent to the issues and directed the attention of the jury to the interrogatories. In these special interrogatories, submitted by appellant, the jury was asked to determine whether Cole's conduct in connection with the hearing was such as to bring or tend to bring Cole into public scorn or tend to shock the com-

[8]It is said in some authorities that to charge generally a jury which is directed to return a special verdict is improper but harmless. (See authorities collected at 5 C. J. S. 1137.) If any defect was thus injected into the proceedings, it was invited by the appellant.

munity. [R. 163-164.] One of the questions asked by the Committee was whether Cole was a Communist. In the light of current agitation concerning Communism it was not only relevant but necessary that the exact place in the case of Cole's politics be explained to the jury. The Court made it plain that its instruction arose from the question asked of Mr. Cole by the Committee. [R. 915.] The Court charged the jury that to call a man a Communist is to expose the person to scorn in the eyes of the public. This, indeed, is the very basis for appellant's defense, and if the instruction were in fact irrelevant, the error would be favorable to appellant.

However that may be the Court went on to explain:

> "You are to bear these facts in mind in judging whether the conduct of the plaintiff was as charged by the defendant. And, in determining this matter you are to bear in mind the following facts and additional instructions." [R. 915-916.]

Thus the purpose of the instruction and its bearing on appellant's interrogatories were pointedly explained to the jury.

Appellant seeks to discover error in the charge that no one has proved Cole to be a Communist.

The appellant had repeatedly declared to the investigators and to appellee that it did not give a "damn whether appellee was or was not a Communist; that it did not care what PEOPLE WROTE OR SAID about Mr. Cole politics; that it was concerned only with Mr. Cole's work as a screen writer and that his work was excellent. The Court could therefore have given the jury instruction much more favorable to the appellee than those given, for the evidence as shown uncontrovertedly took the questio

of appellee's politics out of the case. The appellee's own declarations on the subject amounted, at a minimum, to a practical construction of the morals clause as not including anything bearing on Mr. Cole's political affiliations, whatever they might be. The instruction, however, merely states that Mr. Cole's actual political affiliation was not an issue in the case.

> "These principles should be borne in mind by you in considering the testimony in this case in which reference was made as to certain accusations made against the plaintiff in certain publications and before the Committee which were repeated and discussed in the presence of some of the defendant's representatives. You were admonished at the time when these accusations were repeated here and I admonish you again now that they are to be considered only as having been made and that no one has proved in this lawsuit that these accusations are true. Indeed, the truth of these accusations is not an issue in the case." [R. 916-917.][9]

Furthermore, no prejudice appears. If the instructions were indeed irrelevant, they could scarcely affect the jury's clear determination of the special interrogatories. Reviewing courts will not lightly reverse for giving abstract in-

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[9]Appellant's brief states:

> "And then, as if to leave no doubt of this negation of defendant's theory of the case, the jury was told that the charge of Communism against plaintiff had not been proved. . . . In the context in which that sentence appears in the charge, it could have been taken as nothing else but a direction that the defense was without support in the evidence." (Appellant's Opening Brief, p. 73.)

s this intended to mean that appellant's justification for its at-empted suspension was the alleged fact that Cole was a Communist? f so, nothing in the pleadings or in the record supports such a heory.

structions. (Compare *Beaver v. Taylor,* 68 U. S. 637, 17 L. Ed. 601, with *Johnson v. Jones,* 66 U. S. 209, 17 L. Ed. 117.) Appellant asserts that these instructions were prejudicial, but does not show in what respect or how, even if irrelevant, appellant was injured by them.

The Instruction Relative to the Legal Status of the Communist Party in California Was Free From Error.

The argument (relative to appellant's Specification of Error No. 12, Appellant's Opening Brief p. 74 *et seq.*) reveals the underlying strategy of the defense in the District Court. In this action on an employment contract brought by an employee whom appellant did not discharge but kept tied to it by suspension, appellant sought to try the Communist Party for advocating the overthrow of our government and for acting as agent for a foreign power. In suspending Cole, it did not charge him with being a Communist nor did it place the suspension on that ground. When first told by the Committee to fire Cole as a Communist it refused to do so because "the studio policy is we don't give a damn what people write or say about Mr. Cole's politics." When asked by Eric Johnston not to employ proven Communists it refused because "To do so was an illegal conspiracy, and so in its notice of suspension it charged Cole with having brought himself into public scorn."

The instruction here complained of was aimed directly at a determination of the issue submitted by appellant in the form of interrogatories. What was at issue was whether Cole's conduct before the Committee brought him into public scorn and contempt. The question was the state of public opinion in relation to Cole's conduct before the House Committee, not some determination by

jury after presentation of specially adduced evidence concerning Communists' aims and loyalties.

We respectfully submit it was the duty of the Judge to prevent this action on contract from becoming a forum for denouncing Communism and to prevent allowing the jury to become incited by reason of irrelevant political questions [see comments of District Judge, R. 616], particularly where as here appellant had repeatedly declared that it considered such political questions irrelevant to any of its private contracts with its employees.

The Court's instruction was not one of which appellant can complaint. It dealt with the state of the law relating to Communists in California, and with declaration of judicial notice concerning that subject. (*McKelvey,* Evidence, pp. 58-64; *Viemeister v. White,* 179 N. Y. 235, 72 N. E. 97; *Stultz v. Cousins,* 242 Fed. 794; *Old Colony Trust Co. v. Welch,* 25 Fed. Supp. 45.) It indeed gave the appellant more than its own employment policies embraced.

There was no inconsistency between the rulings excluding evidence concerning the aims and purposes of the Communist Party and the charge dealing with the legal status of the Communist Party and telling the jury that to call a man a Communist was libelous *per se.* The rulings on the evidence and the instructions to the jury were strictly consistent not only with each other but also with the grounds of suspension framed by appellant. Having chosen to suspend (or to seek to suspend) because of the effect of Cole's conduct on the public, it was proper to forbid presenting to the jury special evidence concerning the principles and policies of the Communist Party; the reaction of the public should be based on common knowledge, not on proof of particulars known or claimed to be known by an "expert."

What a court of last resort had said, which was what the instructions covered, was in the public domain and might be considered in determining the state of public opinion.

Appellant further argues that the Court should have instructed the jury that membership in the Communist Party constituted a violation of the Criminal Syndicalism Act. But no decision holds that such membership violates the law. The Court's instructions were properly limited to the state of the declared law as of the time of plaintiff's conduct. A determination in 1948 as to the Communist Party could not possibly affect public opinion in 1947, when the declared law was stated in *Schneiderman v. United States,* 320 U. S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333; *Bridges v. Wixon,* 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443, and *Communist Party v. Peek,* 20 Cal. 2d 536, 127 P. 2d 889 (1942).

The Pre-Trial Order Did Not Preclude the Court From Charging the Jury Concerning Facts Stipulated by the Parties.

Appellants argue it was error to submit to the jury the interrogatory relating to waiver, on the ground that the pre-trial order did not state that such an issue remained for determination. (Appellant's Opening Brief p. 78.) We respectfully submit that the argument is unfounded.

The pre-trial order contains the following stipulations of the parties:

> "(K) Plaintiff well and truly performed all writing services required of him until on or about December 2, 1947.
>
> (L) Defendant Loew's Incorporated well and truly performed each and every obligation of said agree

ments on its part to be performed until December 2, 1947.

(M) On or about December 2, 1947, defendant Loew's Incorporated delivered to plaintiff a certain written notice, a copy of which is attached hereto and marked 'Plaintiff's Exhibit 3.' Since the delivery of said notice neither plaintiff nor defendant Loew's Incorporated has rendered any performance under said agreement; but plaintiff has been and is ready and willing to render his said services.

(N) On October 30, 1947, plaintiff Lester Cole appeared as a witness. . . ." [R. 78-79.]

Thus the principal facts forming the basis for the waiver were in evidence by stipulation, that is, without objection on the part of anyone. Appellant apparently concedes there was no conflict in the evidence on the question of waiver.[10] This being so, it was necessary and proper for the Court to instruct the jury as to the effect of this evidence.

For their argument appellants seek support in an analogy between a pre-trial order and the pleadings. But if this analogy is good, then appellant's argument is destroyed, because F. R. C. P., Rule 15(b) permits issues outside the pleadings to be tried, even without amendment of the pleadings, and this has been applied in an action by an employee on a contract of employment. (*Lientz v. Wheeler,* 13 F. 2d 767; see also *Franklin v. Columbia Terminals,* 50 F. 2d 767; *Low v. Davidson,* 113 F. 2d 364.)

None of the decisions cited by appellant as to the effect of a pre-trial order holds that a Court cannot submit to

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[10]"Since there was no dispute in the evidence over the facts assumed in this instruction, it amounted to a direction to return a verdict for the plaintiff." (Appellant's Opening Brief, p. 80.)

a jury or itself determine an issue unless it has been specified in a pre-trial order; the decisions merely hold that it is no error if a Court declines to do so. In effect, a trial court in the exercise of its discretion may bind the parties by the pre-trial order; but the pre-trial order is not binding on the Court. Indeed, in this very case, the interrogatories submitted by appellant contained substantial departures from the letter of the pre-trial order.

Furthermore, Rule 16, on which appellant relies, does not go so far as to require or permit a statement in a pre-trial order of what issues remain for determination. The meaning of Rule 16 is just the contrary. It is to *dispose* of those issues concerning which agreement is had or admissions are made. The rule provides that the Court's pre-trial order may "limit the issues for trial to those not disposed of by admissions or agreements of counsel." This of course is different from specifying the issues to be determined at the trial. Thus, all issues not disposed of and otherwise relevant to the controversy remained to be determined by the trial. To hold otherwise would be to handicap the conduct of a trial unwisely and unnecessarily.

The Court of course has power to *modify* a pre-trial order at the trial. (Rule 16.) It is of some importance to note that while Rule 15(b), in dealing with the pleadings, uses the word "amendment," Rule 16, in dealing with a pre-trial order, employs the concept of modification. Nothing in the rule requires this modification to consist of an amendment to the order itself. The order of the District Court submitting to the jury the issue of waiver was, in effect a modification of the pre-trial order

(See *Jos. Riedel Glass Works v. Keegan,* 43 Fed. Supp. 153.) It would be ritualistic to hold as error a failure to amend the pre-trial order itself; and in view of the stipulation by the parties to the facts themselves, no surprise or prejudice is conceivable.

The Jury Was Properly Charged Relative to Waiver.

Appellant asserts that the instructions concerning waiver were erroneous because "retention of an employee" for a short time does not amount to waiver "even when done with knowledge by the employer of the employee's misconduct." (Appellant's Opening Brief, p. 80.) The argument is without support in the record, because the Court's charge went significantly further. The Court instructed the jury it could find a waiver if Loew's "put him [Cole] back to work, and accepted his services *with the intention of accepting Cole as its employee under the employment contract.*" [R. 910, emphasis added.] The authorities cited by appellant are not in point, because they deal with the time allowed the employer for investigation before reaching the conclusion to condone or not to condone misconduct. Furthermore, language substantially identical in effect with the instruction complained of has been approved.

In re Nagal, 278 Fed. 105;

Goudal v. De Mille, 118 Cal. App. 407, 5 P. 2d 432;

Leatherberry v. Odell, 7 Fed. 641;

and see:

56 C. J. S. 433.

Having once condoned the misconduct, Loew's could not thereafter rely on it. (*In re Nagal, supra,* 110.)

The jury was charged that a waiver must be intentional [R. 910.] Intention, of course, can be known only by its manifestations, and may even be inferred from circumstantial evidence. (*Majestic Securities Corp. v. Com'rs* 120 F. 2d 12, C. C. A. 8.) The jury was charged that a waiver was "such conduct of the employer as shows his election to forego the right to suspend." [R. 910.]

The argument (Appellant's Opening Brief p. 85) relating to estoppel and to waiver *in futuro* and to amendment of written contracts is based on a misconception. No waiver *in futuro,* amendment, or estoppel is involved.

It is true that the right to suspend could not arise until after the alleged misconduct occurred. It is not the law however, that it could not be waived in advance. (See 3 Williston Contracts, Section 689, pp. 1987 *et seq.*)[11] But in any event so far as the waiver of the right to suspend is concerned, the instructions dealt explicitly with the situation after the testimony. [R. 909-910.]

It was however proper for the Court to charge the jury concerning the effect of the evidence dealing with the situation prior to the Washington hearings. Conceding for the purpose of argument that Loew's could not in advance waive its right to suspend, it could of course waive its existing and continuing right to exact performance in a particular manner by Cole of his duties under the contract. Anyone entitled to performance, or to

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[11] "Wherever the promissee has allowed a legal excuse to arise, relying upon express or implied statements of the promissor that the latter would not avail himself of the excuse, there is waiver. This is a principle distinct from the ordinary equitable estoppel, since the representation is promissory, not a misstatement of an existing fact." (*Ibid,* p. 1989.)

particular kind of performance, may give it up either by an express statement to that effect or by conduct which says the same thing. (California Civil Code, Section 1511(3); 3 Williston Contracts, 1958; Rest., Contracts, Section 88, comment (c).) This is the meaning and application of the Court's instructions dealing with the time before the hearings. [R. 9-7-908.] These instructions go, not to the question whether there was a waiver of the right to suspend because of Cole's misconduct, but to the question whether there was any misconduct. Certainly if Cole had been led to believe that his employers permitted him to act as he thought proper, his behavior could scarcely give rise to contractual rights based on misconduct. The Court made it perfectly clear that this was the meaning and application of the instruction.

> "An employee has a right to rely on statements of the officers and representatives of a corporation by which he is employed in determining whether a certain course of conduct would violate his obligations as an employee.
>
> "If an employer by his words and acts leads an employee to believe that certain conduct by the employee will not be considered a violation of his employment obligations, and the employee, in good faith, acts in such belief, then the employer may not thereafter be allowed to treat such conduct as a breach of the employee's obligations." [R. 907.]

The Court's instructions are admirably arranged in chronological order, dealing first with the period before the hearings, with the right of Loew's to instruct Cole of his behavior in Washington [R. 909], and finally with the period after the hearings. [R. 910.] All of this was directly relevant to the interrogatories.

Appellant's Misconception of the Instructions Pervades Its Argument (p. 88) That the Instruction Excluded Justification for Plaintiff's Belief.

The instruction dealing with the situation prior to the hearings was pointed, as we had said, to the question whether there was a breach at all. The statements of Mr. Mannix and Mr. Mayer to the representatives of the House Committee concerning their official view of Mr Cole's alleged political affiliations and the effect of that affiliation upon his employment by Loew's were admissible to show that the parties never contemplated that the act complained of by the employer on December 2, 1947, was of the kind which would give rise to the right of terminating compensation or employment under the "morals clause." Thus it was not necessary to instruct the jury on the ingredients of estoppel.[12] *Parker v. Funk,* 185 Cal. 347, 197 Pac. 83; *Amer. Nat. Bank v. Sommerville,* 19 Cal. 364, 216 Pac. 376, and *Griffith v. Brown,* 76 Cal. 260 18 Pac. 372, all deal with questions of estoppel, not with waiver, and are therefore not in point.

Since these instructions were pointed to the question whether there was a breach of contract, the Court asked the jury to consider all of the facts and statements of the company's executives. [R. 908.] Furthermore the instruction covered the question whether appellee had been given notice of any change in appellant's attitude, thus giving appellant the benefit of anything at all that occurred before Cole testified which he could interpret as appellant's withdrawal of any consent it had previously

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[12]No interrogatory relating to estoppel was given to the jury. Therefore, even if the instruction was deficient in some respect (which we insist it was not), the special verdicts of the jury on other subjects were unaffected.

given. Implicit in this phrase of this instruction, "but hat the defendant's executives *changed their minds*"[13] is he factor of intentional behavior on the part of appellant. Thus the point contended for by appellant was fully and elaborately covered by the charge.

Appellant further urges that the instruction should have ncluded language requiring Cole to have acted on reasonable grounds in coming to the conclusion that he could conduct himself as he in good faith thought proper. But an employee has the right in good faith to select one meaning of an ambiguous instruction without fear of his ob. (*Park Bros. v. Bushnell,* 60 Fed. 583, 24 LRANS 324n) Furthermore there was not the slightest evidence hat Cole's conclusion could have been unreasonable, and charge submitting such an issue would have been superfluous. Even if it be contended that there was evidence n the basis of which Cole might have concluded that

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[13]Or, to put it differently and more explicitly: If you find that he defendant's executives, Mr. Mayer and Mr. Mannix, performed certain acts and made certain statements, and by such actions and such statements, before the hearings, led the plaintiff Lester Cole to believe that they were not concerned about charges that he was a Communist, or that he was a Communist, and gave him no specific instructions as to how to conduct himself in the matter—and Cole, in good faith, relied on such statements and actions in deciding upon the line of conduct before the Committee—but that the defendant's executives afterwards changed their minds, without notifying Cole before he testified before the House Committee, and without giving him any specific instructions as to how to act, then I instruct you that Cole had the right to pursue the conduct he had decided upon on the basis of the prior acts and statements referred to, if you find them to be true and to have existed, without regard to any later claim or possible claim by his employer that because of his conduct the public might be led to believe that he was a Communist. [Tr. of Rec. pp. 908-909.]

he would be fired if he failed to deny being a Communist[14] (and in the light of the record such a conclusion is wholly unwarranted), it is obvious that there was nothing from which it might be argued that a contrary conclusion on Cole's part was unreasonable. Indeed a review of the record shows that only the most tortured construction of the evidence by a process unreasonably generous to appellant's contention could wring out any grounds on which it would be logical for Cole to conclude that his employment status would be injured if he conducted himself as in fact he afterwards did. But even this is far from making an issue on the question whether Cole's conclusion was unreasonable. The most appellant can point to is Johnston's testimony that he personally (not as Cole's employer) would not employ one Lawson, another witness who testified, if it turned out to be true that Lawson was a Communist. (Appellant's Opening Brief, p. 90.) But that this whole strain of reasoning is an afterthought, and that there was in fact no ground on which Cole could conclude that his employment would be jeopardized by his politics is conclusively shown by the fact that his politics was not at any time referred [and see Mr. Mayer's testimony R. 362] to either as a ground of *caveat* nor as a ground of the suspension.

The Court charged the jury that Loew's had the right to instruct Cole and that it was Cole's duty to follow reasonable instructions. Appellant complains of this instruc

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There was no charge whatever dealing with the effect of Loew's failure to give specific instructions. Appellant's argument that Loew's had a right to presume that Cole's conduct would be lawful and thus was under no duty to give the instruction is not addressed to anything in the record.

The Instructions Were Carefully Balanced and Gave No Undue Prominence to the Theories of Either Party or to Any Specific Evidence.

It should be borne in mind that the Court at no point in the instructions complained of purported to state or to summarize the evidence. Authorities like *Sperber v. Conn. Mutual,* 140 F. 2d 2, are therefore not in point. Further, the Court did not comment on the evidence, but made it plain to the jury that it had no intention of doing so. [R. 893.] *Allison v. U. S.,* 160 U. S. 203, 16 S. Ct. 252, 40 L. Ed. 395, dealing with an aggravated case of judicial commentary amounting to "forensic ardor" is therefore not applicable. Furthermore, the District Court did not select any single act or evidence for particular comment, as was done in *Palmer v. Miller,* 145 F. 2d 926. Nor were the instructions "incomplete and inadequate" and "calculated to mislead," as was the case in *Weiss v. Bethlehem Iron Co.,* 88 Fed. 23, 29, 30.

It is proper for a Court to refer and detail evidence bearing on a particular issue (*Giacomini v. Pac. Lumber Co.,* 5 Cal. App. 219, 89 Pac. 1059) or even to set out evidence which, if believed, would be of controlling importance (*Berthold v. Danz,* 27 S. W. 2d 448); nor is it error to state or to call attention to particular facts (numerous authorities collected at 64 C. J. 690, footnote 15) or to refuse to state in detail evidence relating to a particular theory of the case. (*O'Conner v. Ludlam,* 92 F. 2d 50.) The fact is that the Court charged the jury fully on Cole's duty as an employee [R. 905-907] before touching on the question of waiver. Nothing in the latter instructions selects any evidence for undue prominence. Indeed in referring to the undisputed fact that Mayer and Mannix did confer with Cole relative to the Washington

hearings, the Court was so cautious as to leave it to the jury to find whether the conferences occurred. [R. 908.] Of course the Court's reference to Mayer's statements to Cole in those conferences, to which the Court specifically referred in its instructions, included the very testimony which appellant now asserts was omitted from the instruction, and it was only Mayer's and Mannix' statements which the plaintiff testified he relied on. Johnston, whose testimony appellant contends should have been referred to in the Court's instruction, was obviously speaking for himself, not for Loew's. [R. 508.] With regard to Mayer's testimony before the Committee, the Court left it to the jury to determine whether Loew's changed its mind before Cole testified and if so, whether Cole had notice of it. [R. 908.]

In the light of the admitted testimony of Messrs. Mayer and Mannix with respect to the employer's official position on the very subject matter which the employer now contends justifies its suspension, the Court could have gone much further and commented on the complete absence of any substance justifying the suspension imposed on December 2, 1947. But the Court did not do so. Instead it presented appellant's position to the jury in a light much more favorable than the appellant's undisputed conduct justified.

Finally the appellant made no request for any instruction on the issue of waiver and can scarcely be heard to complain that its theory was not presented.

The Instructions Relating to the Plaintiff's Conduct Were Free From Error; in Any Event Appellant Has Waived the Point.

After the Court had instructed the jury the appellant objected to a portion of it, including the charge that the jury must determine the effect of plaintiff's conduct [R. 901]; the objection was: "Our objection to that particular instruction is that it requires the defendant to show that the conduct had the effect and not merely, as the contract provides, that it had the tendency to produce that effect." [R. 924.] "I just wanted to say that the same objection recurs throughout other parts of the charge and in Question 1, the proposed special verdict." [R. 925.] The Court yielded to the objection and after the jury was brought back said:

> "As a result of the conference between counsel and the Court, some instructions have been modified and I will reread them to you in the modified form . . .
>
> "In the main instructions I defined certain words, giving you their meaning and stating to you that it is for you to determine, from all the evidence, whether the conduct of the plaintiff had the effect or *tended to have* the effect set forth in the notice which was based on the Clause 5 of the contract, which has been referred to as the morality and public conduct clause.
>
> ". . . In answering the special interrogatories which will be submitted to you, you must determine as to each whether the conduct of the plaintiff in the particular instance referred to—namely, his appearance before the Congressional Committee—was of such character that you, as jurors, can say that, under our American standards of right conduct, it did shock or *tend to* shock and offend the community

and/or brought the plaintiff or *tend to bring* the plaintiff into public scorn, hatred or contempt as herein defined.

". . . In this case, the defendant having notified the plaintiff that it suspended the plaintiff upon the ground that he so conducted himself at this hearing and in connection with it as to bring himself or tend to bring himself into public scorn, hatred, contempt or ridicule, or shock or offend or *tend to* shock or offend the community or prejudice the defendant or the industry in general, they must show, and you must be convinced by a preponderance of the evidence that such was the case, before you answer the first three questions propounded to you in the affirmative.

". . . Thus, in order to find that the plaintiff so conducted himself as to bring himself into public scorn, hatred, contempt, or ridicule, or to shock the community or prejudice the defendant, or that the conduct had such tendency, you must find, from all the evidence, and by a preponderance of the evidence, that his conduct, which it is charged had or *tended to* have that effect, was wilful and intentional." [R. 955-957.] (Emphasis added.)

Thus the Court repeatedly informed the jury it had modified the instructions, and made the correction not less than four times.

Thereafter and before the jury retired to consider its verdict the Court called for "any additional exceptions which are not already in the record." [R. 962.] Appellant responded, "We have no additional ones, your Honor." [R. 962.]

The point made in appellant's opening brief (p. 101), even assuming it to be good, was therefore waived. Ap-

pellant said nothing, even though invited to do so by the Court, about inconsistency or lack of clarity. Any such statement in the District Court would have been preposterous in the face of the fourfold correction. The record therefore discloses no objection at this point nor any grounds for criticisms. The point now argued, whatever its merit otherwise, was therefore waived. (Rule 51; *Krug v. Mutual Benefit Health,* 120 F. 2d 296; *Shevlin-Hixon Co. v. Smith,* 165 F. 2d 170.) Indeed the rule is of such force that because of the "absence of exceptions *in the respect complained of,* nothing is here for review." (*Grand River Dam Authority v. Thompson,* 118 F. 2d 242; to like effect is *Thiel v. Southern Pacific,* 149 F. 2d 783, 788.) (Emphasis ours.)

Furthermore the argument is misconceived. The District Court informed the jury clearly that the instructions had been modified, and appellant's search for inconsistency is unfounded. The jury was instructed that in answering the special interrogatories they should determine whether plaintiff's conduct shocked or tended to shock the community or brought or tended to bring the plaintiff into scorn [R. 955-956]; they were told that the defendant's notice of suspension was based on defendant's charge that the plaintiff's conduct brought or tended to bring him into scorn or shocked or tended to shock the community. [R. 956-957.] Thus there was no inconsistency between the instructions and the interrogatories. It is true the modified instructions differed from the original, but this is the very purpose of Rule 51. If there was any error, giving the modified instructions cured it. (*Lake v. Mudgett,* 252 Fed. 359 (C. C. A. 6, 1918); *Emmons v. Lehigh Valley* 223 Fed. 810 (D. Ct. N. Y.); *Francis v. Seas Shipping*

Co., 158 Fed. 584 (C. C. A. 2, 1946); *Tonner v. Spears-Wells Machinery Co.,* 126 Cal. App. 763, 14 P. 2d 1051.)

Appellant further argues that Loew's was not limited to the grounds stated in the notice of suspension but included the right to suspend for conduct which *tended* to shock the community. This point has become moot so far as the instructions are concerned because the Court adopted appellant's theory. In any event the contention that Loew's could give a notice stating the grounds of *suspension* (not termination) and then rely on grounds other than those stated is bad. It is an iniquitous theory, and none of the decisions cited by appellant supports it. Authorities dealing with justification for *discharge* are not in point.

Even in the case of a discharge, employers who have specified the grounds for discharge have been held to those stated. (*Mortimer v. Bristol,* 180 N. Y. Supp. 55, 190 App. Div. 452; *Kiker v. Bank,* 27 N. M. 346, 23 P. 2d 366; *Vicknair v. Southside Plantation Co.,* 10 La. App. 43.)

But suspension is different from discharge or termination. An employer always has the *power* to terminate, even though to do so may subject him to damages; and it is probably true that the *right* to discharge may exist as a reserved right, without the necessity of express provision therefor in a contract of employment. The right of suspension exists only by virtue of contract, and then only under the conditions specified. But for the contract

permitting a suspension of payment, an employer who should refuse to pay salaries at specified intervals would be guilty of a misdemeanor. (Cal. Labor Code, Sections 204, 215.)

Termination or discharge leaves the employee free to seek a livelihood elsewhere. Suspension or refusal to pay salaries, as in the present case, would render the employee powerless to earn a living anywhere during the period of the suspension. The situation is aggravated by the right given the employer to extend the term of the contract for the period of the suspension. For these reasons, as we have shown, suspension for a breach can only be for one which it is within the employee's power to remedy. To argue that an employer can specify certain grounds of suspension and then rely on others is to urge a gross injustice. The employee could be put in the position of curing the defects specified only to be told that these were not what his employer had in mind, or perhaps not all of what his employer meant; and under the contention appellant urges, the employee need never be told what the grounds of the suspension are; and the employer may continue to extend the term of the contract. We do not think such a contention commends itself for acceptance to any Court.

The famous doctrine in *Ohio and Miss. Railway Co. v. McCarthy,* 96 U. S. 258, 267, 24 L. Ed. 693, is applicable here:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy

he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold."

And the rule in California is settled that a specification of certain grounds constitutes a waiver of all others. (See for example, *Kofold v. Gordon,* 122 Cal. 314, 54 Pac. 1115; *Hoover v. Woolfe,* 167 Cal. 337, 135 Pac. 794; *Ray Thomas, Inc. v. Cowan,* 99 Cal. App. 140, 277 Pac. 1086.)

The Charge Relative to the Rights of Witnesses Was Relevant, Not Prejudicial.

Appellant's argument in support of its Specification of Error No. 11 is founded on a misconception. Appellant's argument supposes that in order to be relevant an instruction must deal specifically with the very issue to be decided by a jury, and that if the instruction deals with other matters it is irrelevant. This is not the law even in those cases in which the jury is called on to render a general verdict. It is more plainly a misconception in the present case, in view of the fact that the jury was called on merely to answer four interrogatories.

Appellant's letter notifying Cole he had been suspended [Ex. 3, set out at R. 174] stated that Cole had refused to answer certain questions addressed to him by the House Committee, and that by his failure to answer those questions and by his statements and conduct before the Committee and in connection with the hearings he had violated

the morals clause. Thus the supposed justification for the suspension, which appellant asserted, pointed almost exclusively to Cole's conduct as a witness before the Committee. Surely there could be no closer relevance to the subject of appellant's justification and to the issues of the case than were the subject matters of the very instructions complained of.

It is not the law that instructions must be limited to those instructions which, on being answered Yes or No, determine the question. It is the proper function, if not the duty, of the trial judge, to inform the jury by his instructions of so much of the law as is relevant to the issues and as will assist the jury in a general understanding of the facts. (*Jennings v. Arata,* 83 Cal. App. 2d 143, 146, 188 P. 2d 260; *James v. Meyers,* 68 Cal. App. 2d 23, 156 P. 2d 69.) To argue otherwise would be to condemn, for example, general instructions dealing with the credibility of witnesses in cases where no witness has been impeached, or the nature of the evidence, or in appropriate cases of the fact that an accident occurred on a street which was a public highway, and the like.

Appellant's argument that the court's instructions concerning legislative hearings "tended to divert the jury from the real issue" and permitted the jury to frame their answers to the interrogatories on a false basis, is without support in the record. Nothing in the instructions told the jury that it was to answer the interrogatories on the basis of Cole's rights before the Committee. The court's instructions relative to answering the interrogatories [R

918, *et seq.*] dealt solely with the questions in the interrogatories themselves.

Appellant next argues that whether plaintiff's conduct before the Committee was lawful was a question of law, not one of fact. It is unnecessary to argue this beyond the point of saying that the jury was not directed to determine the question. As a matter of fact appellant itself urges that the question of contempt was not in the case. This the court recognized, and did not submit that question to the jury for its determination.

Appellant further argues that the court instructed the jury that Cole's conduct was lawful if it were motivated by a desire to procure a judicial determination. This argument is a distortion of the record. The court plainly told the jury that the Committee was legally constituted and that it had the right to ask the questions which it did ask. [R. 911.] The court commended the process of legislative inquiry. [R. 911.] Further the court laid down the test, admittedly proper, for contempt. [R. 912-913.] In saying that a witness may decline answering certain questions in order to secure a determination of the courts, the jury was instructed that when a witness does so "he paves the way for contempt proceedings in the courts." [R. 911.]

We respectfully submit that this is a correct statement of the law. Furthermore, in view of appellant's argument that the question of contempt was not an issue in the case, this instruction sufficiently covered the facts in the case.

The Jury Was in Fact Instructed as to the Attitude Toward Communism of the American Public.

Appellant complains that the court failed to instruct the jury that the American public look with scorn on Communists and Communist sympathizers. (Specification of Error 13; App. Op. Br. p. 106.) The substance of Defendant's Requested Instruction No. 7, to which this Specification of Error relates, is that the courts will take judicial notice of the fact that "many average and respectable persons in this country look with scorn and contempt upon the Communist Party of America and upon its members and politics." [R. 101.] The exact objection to the court's failure to give this instruction was as follows: "We will object to the refusal to give defendant's requested instruction No. 7." [R. 922.] It is important to keep in mind the stated objection because as a matter of fact the court did give the substance of the instruction.

The court instructed the jury that "In California it is libelous to call a person a Communist. This, for the reason that such a charge would expose a person to the hatred, contempt and ridicule of many persons." [R. 915.] The court further instructed the jury:

> "In California an accusation of Communism against a person is libelous. This is so because, under California law, every false and unprivileged publication which exposes a person to hatred, contempt, ridicule or obloquy or causes him to be shunned or avoided . . . is libelous, *per se*." [R. 916.]

At another point in the instructions the court referred to a charge of Communism as one "of a character to affect his reputation." [R. 916.] As far as the substance of the Defendant's Requested Instruction No. 7 is concerned, the instructions actually given completely cover the same subject matter and in the same way.

So long as the substance of a requested instruction is given to the jury, or so long as the purpose of the requested instruction is accomplished by other instructions, there is no cause for complaint. (*Short v. Tarmer,* 260 Mass. 102, 156 N. E. 735.)

The remaining objections quoted by appellant under this same head (Appellant's Opening Brief, pp. 107-109) are not before this Court. Since the grounds of those objections were not stated in the District Court, there is nothing here to review. See authorities cited under heading *"The Instructions Relating to the Plaintiff's Conduct Were Free From Error; in Any Event Appellant Has Waived the Point," supra.*) In any event, the arguments are not well founded. The jury was told several times, as a fact, that the American public held Communists in contempt, nor were the Court's instructions limited to membership in the Communist Party. On the contrary, the Court referred to an "accusation of Communism," which carries with it every degree of sympathetic acceptance of the doctrines of that political party or political philosophy.

III.

The Trial Court's Rulings on Evidence Were Free From Error.

The Exclusion of the Conduct of Other Persons Was Proper.

Under Specification of Error 1, appellant has sought to preserve for review the Court's exclusion of a question [R. 651] and the Court's exclusion of motion picture films. [R. 721, 731.][15]

The excluded question was whether Cole *knew* that one Lawson (not a party to this action, not an employee of Loew's, and a stranger to the employment contract) intended to read a prepared statement when called as witness before the House Committee. The films would have shown the conduct of nine persons other than the plaintiff, while testifying at the Committee hearings.

The exclusions were proper.

Appellant does not argue that Cole's *knowledge* or whether Lawson intended to read a statement was relevant to any of the issues. Since this was the gist of the question, the failure to argue the point constitutes a waiver. *Zap v. U. S.*, 151 Fed. 100 (C. C. A. 9), aff'd 328 U. S. 624, 90 L. Ed. 1477, 66 S. C. 1277; *Stetson v. U. S.*, 155 F. 2d 359(C. C. A. 9), and see *E. K. Wood Lbr. Co. v. Moore Mill etc. Co.*, 97 F. 2d 402 (C. C. A. 9).)

Appellant treats the exclusion of this question under the same heading as the excluded films, that is, as evidence

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[15]No other offers are included in this Specification. Appellant did not offer to read the transcript, although this was discussed by court and counsel. [R. 828.] However the reply made to the other arguments would sufficiently dispose of an offer to read the transcript, if one had been made.

showing the conduct of others. This is, of course, unfounded, because the question deals with Cole's foreknowledge; the films deal with the behavior of others. The failure to make an offer of proof is essential where the significance of the proffered evidence is not clear. (*Hoffman v. Palmer,* 129 F. 2d 976, 994.) But even assuming this question to seek no more than evidence of the conduct of others, the exclusion was proper because it was proper to exclude evidence of the conduct of others.

The Proffered Evidence Was Not Relevant.

Appellant's first argument is based on the reasoning behind California Code of Civil Procedure 1854. Appellant urges that since the joint policy statement was put in evidence, and since the statement referred to the conduct of others, the Court should have permitted appellant to show what that conduct was. But neither the California Code Section nor the reasoning behind it supports appelliant's contention. The Code section was never intended to compel the reception of irrelevant evidence. (*John Bruener v. King,* 9 Cal. App. 271, 98 Pac. 1077; *People v. Girotti,* 67 Cal. App. 399, 227 Pac. 936; *Mills v. Rosenthal,* 90 Cal. App. 390, 405, 266 Pac. 320; *Bacon v. Grosse,* 165 Cal. 481, 132 Pac. 1027.) Indeed, the California Supreme Court has said:

> "Where a party seeks to introduce incompetent evidence, relevant, if at all, only because connected with other evidence already in the case, and admissible solely because of such connection, and where, if erroneously admitted, it would be prejudicial to one of

> the parties, and would have little, if any, proper weight with the jury, the trial court if in doubt as to the sufficiency of the connection shown, should resolve the doubt in favor of the exclusion of the evidence . . ." (*Avery v. Wiltsee,* 177 Cal. 484, 487, 171 Pac. 95, 96.)

In the present case, the combined action of the employers themselves in forever banning from their employ a number of persons at the same time and by the same paper which banned the plaintiff can offer no justification for bringing in the controversies between those other persons and the motion picture industry.

The other asserted ground for reception of this evidence is even less tenable. First, the notice of suspension stated it was based on Cole's conduct; no reference was made to the conduct of others. The employer therefore cannot justify on other grounds.

Furthermore, having in mind that Loew's chose to suspend, not to terminate, and that a suspension under the contract can only be for Cole's failure to comply with his contract, the conduct of others is clearly irrelevant.

Again, since a suspension can only be for inaction or for omission or for a breach which is remediable by the employee, how can it be argued that the past conduct of other persons is even remotely relevant to the issue of appellant's justification?

The argument of appellant that the conduct of ten persons would be more likely to create public indignation than

would the conduct of one is not applicable to appellant's rights under the contract.

If remaining in public favor were a condition of Cole's continued employment it would have been necessary for appellant to show only that Cole was held in public contempt. But this contract was not so drawn. Here to justify the suspension appellant must show such conduct on the part of plaintiff himself as to constitute a breach of his obligations under the contract, not merely the attitude of the public.

We respectfully submit that on the merits and without regard to the state of the record, the exclusions were eminently proper. No rule or reason requires the reception of the evidence. And to have permitted appellant to try the conduct of nine other persons would have transformed this contract action between a single plaintiff and a single defendant into a mass trial, and the issues as they relate to the plaintiff and to the defendant would have been buried beneath nine layers of irrelevant controversies.

Beyond this, even if the evidence were otherwise admissible, it was proper for the Court to exclude until a satisfactory preliminary showing had been made. Before the reception of evidence tending to charge one with the conduct of another, as for example in cases of conspiracy or agency, it is within the discretion of the trial Court, and it is better trial practice, to require satisfactory evidence of the agency. (*First Unitarian Soc. v. Faulkner,* 91 U. S. 415, 23 L. Ed. 283; *Globe and Rutgers Co. v. King Foong, etc.,* 18 F. 2d 6, C. C. A. 9; *Buckley v.*

Christmas, 121 F. 2d 323, C. C. A. 4, cert. den. 314 U. S. 679, 62, S. Ct. 180, 86 L. Ed. 543; *Feigenbutz v. U. S.,* 65 F. 2d 122.) Indeed it has been held reversible error to receive evidence of conspirators' acts before the conspiracy has been established. (*People v. Walther,* 27 Cal. App. 2d 583, 81 P. 2d 452; *People v. Doble,* 203 Cal. 510, 265 Pac. 184.

Whether there has been a sufficient showing of a conspiracy to permit reception of testimony of co-conspirators lies within the discretion of the trial Court. (*Kelley v. State,* 210 Ind. 380, 3 N. E. 2d 65; *State v. Moore,* 217 Iowa 872, 251 N. W. 737; and see 16 C. J. 654.) That discretion will not be questioned unless it is abused. (*Antonio Pepe Co. v. Apuzzo,* 89 Conn. 807, 120 Atl. 681.) A high degree of proof of the conspiracy is essential if the issue is tried to a jury. (*Hobbs v. State,* 86 Ark. 360, 111 S. W. 264; *Miller v. State,* 139 Wisc. 57, 119 N. W. 850.)

No conspiracy or other agreement to act in concert was shown. The casual reference in the testimony of a single witness to an admission made out of Court to him by Cole [R. 362] is too trivial to constitute substantial evidence. Even that testimony does not purport to show any agreement by Cole, and if it be assumed that the evidence was offered for that purpose (which could not have been guessed by anyone at the time of the trial) it was within the trial court's discretion to hold that it was insufficient as a foundation to charge Cole with the conduct of others.

Evidence of the Public Attitude Toward Communism and Testimony by the Unqualified Witnesses of the Public Opinion Toward Cole's Conduct Were Properly Excluded.

Specifications of Error Nos. 2 and 3 relate to several kinds of evidence which it is impossible fairly to consider under a single heading.

One of the questions excluded was addressed to Mr. Mayer, a witness not shown to be qualified as an expert on the subject of public opinion. The question he was asked did not deal with Cole alone. He was asked his "observation of public opinion with reference to the *hearings.* And particularly to *that portion of the hearings* in which the questions were asked by the Committee and not answered by *certain of the parties,* including Mr. Cole?" [R. 357-358.]

The question was, therefore, much too broad, and was objectionable on that ground alone. It would have brought before the jury the public reaction not toward Cole, but toward the hearings themselves, an issue remote from the rights and obligations of the parties under the employment contract. The portion of the question dealing with questions not answered was likewise directed to the hearings. And in any event it called for public reaction to the conduct of *all witnesses,* whoever they may have been, who failed to answer any questions. Most generously construed, the question was subject to the same defects as was other offered evidence of the conduct of persons other than the plaintiff. It was plainly irrelevant.

Furthermore, the witness was not shown to be qualified to state "his observation of public opinion." Note, the question did not call for a specific comment by specified or ascertainable persons. It called for "public opinion."

The distinction is important. What Jones or Smith or Robinson said or did is an observable fact. Whether they or any given number of persons or any particular selection of individuals represent public opinion is not an observable fact, but is a matter of opinion. Even to ascertain what is meant by the phrase "public opinion" calls for the judgment of experts in an elusive and treacherous field of study. For example, was Mr. Mayer qualified to say what percentage of a community is "the public"? Even after determining what the phrase means, the work of ascertaining the state of public opinion on a given subject requires, as is well known, extensive field work, careful coordination of data, application of statistical mathematics and the calculus of probability.[16] The witness was not shown to have any such qualifications.

Another ground of exclusion was the fact that no proper foundation had been laid, or was offered, for the question asked. [R. 358.] Before even an expert may give an opinion, the Court may require evidence in the record of facts on which the opinion is based. (*Commercial U. S. Co. v. Pacific Gas & Electric Co.,* 220 Cal. 515, 31 P. 2d 793; *Hornby v. State Life Insurance Co.,* 106 Nebr. 575, 184 N. W. 84.) An expert is not permitted to base his opinion on any source other than the evidence in the case. (*Atlantic Life Insurance Co. v. Vaughan,* 71 F. 2d 394, C. C. A. 6 (cert. den. 293 U. S. 589, 79 L. Ed. 684), 55 S. Ct. 104; and *cf. United States v. Burns,* 69 F. 2d 636, C. C. A. 5.)

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[16]Even so, the results have notoriously been found to be so grossly inaccurate that it may well be argued that public opinion is beyond the testimony even of experts.

For each of these several reasons question addressed to Mr. Mayer was properly excluded.[17]

The claimed error in excluding the editorials is wholly unfounded. The editorials were never offered. There was, therefore, nothing before this Court to review. (*Hagen v. Porter,* 156 F. 2d 362 (C. C. A. 9, 1946), cert. den. 67 S. Ct. 85 (1946); *Patten v. Lewis,* 146 F. 2d 544.)

The Court did not at any time directly rule or even indicate it would exclude the editorials. Referring both to the editorials and to motion pictures the Court said:

> ". . . I say now that I am satisfied . . . that the editorials cannot be shown.
>
> "There is one additional thought, and I am *not ruling definitely on it.* I am giving my additional thought to it. . . ." [R. 823.]

And in the discussion that followed the Court further said:

> "And for those reasons, also, I believe that the testimony of Mr. Johnston that he saw the editorials would not warrant our introducing the editorials

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[17]Although it is not necessary on this appeal to justify the reasoning of the trial judge, it is worth observing that the District Court's theory for the exclusion of this and other offers of evidence was admirably conceived toward getting an accurate and just determination of the issue. Since the critical issue turned on "public" opinion; and since it was obviously impossible to bring the public into the courtroom to testify; and since the problem of determining whether any witnesses or group of witnesses were fair samples of the public was insuperable; the trial court concluded that the nature of the public reaction should be judged from the conduct itself, just as in cases of libel the question whether a given utterance brings one into public scorn is determined not by calling witnesses to testify as to their reactions but from the nature of the statements published.

. . . and I do not believe that the testimony which was brought out on the part of the plaintiff in reporting to the plaintiff to the effect there was some consultation about the matter would warrant you in introducing what the other persons did . . .

"I have allowed you to introduce, to go into as much detail, and you may go into further detail. . . . but the mere fact that the names were referred to would not in themselves warrant the introduction of the nine pictures. Now, that is my thought at the present time. *I may change my mind in the morning,* but I am very positive about it . . . in other words, let me say this frankly. . . ." [R. 825.]

"In view of that, and in view of my attitude toward the law, which may be assumed to be positive, they [defendant?] may have objections, but I *do not think they will change my mind,* because I have lived with this thing for three weeks and *my mind is still on it.*" [R. 826-827.]

Since there was no offer, there was no occasion for a ruling. But it is plain that even if the colloquy by the Court is incorrect, no final conclusion had been reached by the Court as to the admissibility of the evidence. But even if we should assume that the editorials were offered and rejected, no error was committed. The point was thus covered by the equivalent of indisputable evidence. [R. 915, 916.] A party has no right to offer evidence on a matter of which judicial notice is taken. (*Lane v. Sargent,* 217 Fed. 237, C. C. A. 1; *Commissioner v. Marzynski,* 149 Mass. 682, 21 N. E. 228; *Taggart v. Keebler,* 198 Ind. 633, 154 N. E. 495; and *cf. Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292 at 301

81 L. Ed. 1093, 57 S. Ct. 724; and see *Tilton v. Russek,* 171 Cal. 731, 734, 154 Pac. 860, 862, saying that judicial notice "presupposes the absence of evidence."

The last item of evidence offered was the testimony of Mr. Max Eastman. The exclusion, however, was proper for the following reasons: Eastman was not qualified as an expert on public opinion. The objection to Mr. Mayer's testimony was likewise applicable to his testimony. There was no sufficient foundation shown in the offer of proof to permit the question relating to public opinion. The only foundation offered was that "for many years and particularly the last two or three years" Eastman had been lecturing to divers audiences on social, economic and political problems. [R. 829.] It was within the discretion of the Court to hold that this was insufficient as a foundation, and this determination will not be disturbed on appeal unless clearly erroneous. (*White v. State of Maryland,* 106 F. 2d 392, 397; *Congress, etc. v. Edgar,* 99 U. S. 654, 25 L. Ed. 487; *Hutter v. Hommel,* 213 Cal. 677, 3 P. 2d 554; *New York Central Railway v. Newbold,* 151 N. Y. Supp. 732, 166 App. Div. 193.) It is clearly reasonable to conclude that a lecture platform is scarcely the equivalent of a Gallup Poll.

Again, there was no offer to show what the state of public opinion was concerning the Communist Party. [R. 829.] The offer was to show that the witness had such an opinion. This, of course, was plainly irrelevant.

But on the further assumption that the offer did include an offer to show what the public thought of Communists and Communism, we insist the evidence was irrelevant and the exclusion was proper because the subject matter was covered by the Court's instructions. Judicial

notice renders evidence superfluous. Finally, the attitude of the public toward Communists was immaterial because the defendant did not suspend plaintiff upon this ground. This evidence was immaterial because the notice of suspension did not charge Cole with being a Communist; and the public reaction to Communism cannot justify the suspension. What was in issue was the effect of the conduct of Cole which was described in the notice. To receive evidence and thus to create an issue as to the public attitude toward Communism would be to impose contractual consequences on Cole on a matter not within the scope of the issues. This would be wrong as a matter of law; it would also tend to influence the jury with passions and prejudices not germane to the issue. It was the court's duty to exclude. [R. 616.]. (*Cf. Owd v. Heller,* 82 N. H. 387, 134 Atl. 344.)

The Court Properly Excluded Evidence of the Aims and Loyalties of the Communist Party.

The issue concerning which appellant argues this evidence was relevant was whether Cole violated the moral clause of his contract by his conduct at the hearings. Appellant's argument is further based on the assumption that the public had the right to infer, and did in fact, infer from Cole's failure to answer certain questions, that he was a member of the Communist Party, and therefore the scorn and contempt held by the public for the Communist Party could be imputed to Cole. But, even conceding this much of appellant's premises solely for the purpose of argument, it does not follow that evidence tending to show the aims and loyalties of Communists was admissible.

It must be recalled that the notice of suspension did not purport to be based on Cole's *unlawful* conduct; and the employment contract did not give Loew's the right to terminate or suspend solely for the commission of a crime. Evidence, therefore, of the claimed criminal character of any organization to which Cole inferentially belonged would, therefore, not be material.

It should also be recalled that the Court did in fact instruct the jury as to the public attitude toward Communists as declared by the courts and this instruction accomplished all that appellant was entitled to accomplish, and more, because it not only put that before the jury but it gave that information to the jury in a form which rendered it indisputable.

Furthermore, the conclusion of the jury on evidence of special facts, or the conclusion of the jury based on information specially elicited for it, or based on anything not a matter of common knowledge, or in fact on anything justifying the reception of evidence would not determine any relevant issue. Such a conclusion would elicit, not a public reaction, but a reaction peculiar to the confines of the courtroom in which that evidence was brought forth.

It cannot be presumed that the public reaction was based on special information; and there was no reason to show that the evidence sought to be elicited from Mr. Eastman was public knowledge.

It needs only to be added that this evidence was not only irrelevant but was of a character to confuse and inflame the jury. Even if it were relevant (and we insist that it was not) it would have been within the discretion of the trial court to have weighed the degree of relevancy

as against its inherent tendency to make it impossible for the jury to consider the evidence calmly and dispassionately.

The Inquiry as to Cole's Motives for His Conduct Was Properly Excluded.

Under its Specification of Error No. 5 appellant argues it should have been permitted to ask Cole whether he was a Communist, and it seeks to support its contention on the ground that the question was within the scope of the direct examination.

The question was properly excluded. Whether Cole was a member of the Communist Party was irrelevant in the issue for the reasons already argued. Furthermore, collateral and irrelevant issues may not be inquired into on cross-examination. (*U. S. v. Manton,* 107 F. 2d 834 (C. C. A. 2, 1939); *Sims v. Green,* 160 F. 2d 512; *Sutherland v. U. S.,* 92 F. 2d 305.) "It is a very plain corollary to that rule that a question not otherwise material or proper does not become so by force or any purpose of the examining party to make issue of it to discredit the witness by contradicting his answers to it." (*Despiau v. U. S. Casualty Co.,* 89 F. 2d 43, 45 (C. C. A. 1, 1937).)

Furthermore, the scope of cross-examination on collateral matters is "peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion. 3 Wharton's Criminal Evidence (11th ed.) sec. 1308." (*U. S. v. Manton, supra,* 845.)

The Court Properly Excluded Questions Relating to Cole's Awareness of the Public Attitude Towards Communism.

Under appellant's Specification of Error No. 6 it argues it should have been permitted to elicit evidence showing Cole's awareness of the public attitude toward Communists and Communism.[18]

Such evidence was irrelevant and was properly excluded. Cole took the risk of the contractual consequences of his behavior. Had he been fully unaware of the possibility of bringing himself into scorn his ignorance would not have helped him, if indeed his conduct had brought him into scorn; nor, had he been fully apprised of the risks he exposed himself to, would his foreknowledge have helped. The contract gave Loew's certain rights by reason of the effect of Cole's conduct, not by reason of his precaution, prudence, foresight, or lack of any such qualities.

It is true the jury was instructed as to wilfulness, but the jury was merely told it was an intentional act. [R. 904.] Nothing was said about foreknowledge or awareness of possible consequences. Indeed the situation is like that in *Polkinghorn v. Riverside Portland Cement Company,* 24 Cal. App. 615, 142 Pac. 140, in which the Court excluded a question calling for knowledge of the existence of danger, but afterwards instructed the jury that the defendant was in fact charged with knowledge; the Court held that the error if any was cured by the instruction. (See also *Relfe v. Wilson,* 102 U. S. append. cl. xxxix, 26 L. Ed. 212.)

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[18]Appellant's statement of this Specification is too broad; it includes an argument on the exclusion of questions concerning Cole's awareness of the consequences of his failure to answer questions. No such question was asked of Cole or included in the Specification of Error. However the reply here made would suffice to justify the exclusion of such question had it been asked.

Furthermore, since the subject of the question was collateral to the issues, it was not proper cross-examination. (See authorities *ante* under the hearing dealing with the exclusion of the public attitude towards Communism.)

Finally the error, if any, was cured by the verdicts. The jury found that Cole had not violated his contract; therefore the attention he gave to the possible consequences of his conduct was rendered academic.

Loew's Continued Payment of Salary Was Relevant to the Issue of Waiver,

and

The Continued Showing of Motion Pictures Was Relevant to the Effect of Cole's Conduct.

Under its Specification of Error No. 7, appellant argues that it was error to receive evidence of the continued payment of Cole's salary and evidence that Loew's continued to distribute various motion pictures written by Cole.

The two kinds of evidence should be considered separately. As to the continued payment of Cole's salary, this was included in the stipulation embodied in the pre-trial order. That stipulation recites that Loew's well and truly performed each and every obligation of the employment agreements until December 2, 1947. [R. 78-79.] Obviously payment of weekly salaries was one of its obligations under the employment agreements. [Contract, Article 17, R. 23.] This evidence therefore went into the record without objection; and appellant cannot complain now.

Furthermore, the continued payment of salaries was plainly relevant to the issue of waiver.

That the issue of waiver was properly in the case has already been argued. (See discussion and authorities under heading *The Pre-Trial Order Did Not Preclude the Court From Charging the Jury Concerning Facts Stipulated by the Parties.*)

Appellant's argument that the continued distribution of the motion pictures was not inconsistent with suspension and that the evidence should therefore be excluded misses the effect of this evidence. This evidence shows that Cole's conduct did not have the effect which Loew's professed it had. That Loew's should continue to exhibit motion pictures written by Cole and carrying his name as author was of course wholly inconsistent with its professed statement that Cole's conduct had shocked the public and tended to injure Loew's. The very point of the morals clause which appellant relied on (and the only point on which it could rely) was that Cole's conduct had marked him for the public as an individual who was to be scorned, and that by reason of that scorn Cole's value to his employer diminished. But notwithstanding Cole's conduct Loew's continued to run motion pictures written by Cole. We insist this evidence was not only relevant but the strongest evidence showing that Loew's position was unfounded.

Furthermore, the admission of evidence even if deemed irrelevant, is of no consequence unless it be shown to be prejudicial. The reception is largely in the discretion of the trial court, and that discretion will not be overturned except on a plain showing of abuse. (*NLRB v. Donnelly Garment Co.,* 330 U. S. 219, 67 S. Ct. 756, 91 L. Ed. 854, 867; *Standard Acc. Ins. Co. v. Heatfield,* C. C. A. 9, 141 F. 2d 648; *Fort Street Union, etc., v. Hillen,* 119 F. 2d 307 (C. C. A. 6).)

IV.

The Affidavit to Transfer the Cause Did Not Disclose Any Personal Bias or Prejudice and Was Insufficient.

After the plaintiff's motion for judgment on the pleadings was filed, and after it had been argued and submitted, and while the parties were waiting for a decision on that motion, but before a decision was rendered, the defendant filed an affidavit for the transfer of the cause to another judge. [R. 48, 51.]

The affidavit alleged on information and belief that the District Judge has a personal bias and prejudice against the defendant and in favor of the plaintiff. This conclusion was supported by the following: It was averred that the District Judge had said, at a time when there was no cause pending in the United States Court that there was no legal justification for the suspension of any of the persons who had been indicted, that if any of the cases arising out of the suspension came before him he would have to render judgment for the plaintiffs, and that if he were the attorney for the plaintiffs he could recover judgments in their favor for millions of dollars. [R. 44.] It should be noted no person, either employer or employee, plaintiff or defendant, was named.

The District Court held that the affidavit was insufficient because it failed to state any facts pointing to *personal* bias or prejudice. [R. 53 *et seq.*]

The ruling was obviously correct.

The affidavit must be strictly construed. (*Scott v. Beams,* 122 F. 2d 777, cert. den., 315 U. S. 809, 62 S. Ct. 799, 86 L. Ed. 1209; *Keown v. Hughes,* 265 Fed. 57; *Sanders v. Allen,* 58 Fed. Supp. 417.)

The statement that the District Judge was personally biased or prejudiced does not satisfy the statute; facts must be stated to show the existence of the personal bias or prejudice. (*Hurd v. Letts,* 152 F. 2d 121; *Millslagle v. Olson,* 128 F. 2d 1015, reh. den., 130 F. 2d 212; *In re Lisman,* 89 F. 2d 1898; *Wilkes v. United States,* 80 F. 2d 285; *Benedict v. Sieberling,* 17 F. 2d 831.)

The exact meaning of the word "personal" in the statute (28 U. S. C. A., Sec. 25) is that bias or prejudice *in favor of or against one of the parties* which renders a fair consideration of the issues unlikely. [*Ex parte American Steel Barrel Co.,* 230 U. S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379; *Equitable Trust Co. of New York,* 232 Fed. 836; *Wilkes v. United States,* 80 F. 2d 285; *Price v. Johnson,* 125 F. 2d 806; *Henry v. Speer,* 201 Fed. 869; and see authorities collected in opinion of District Court, R. 55.]

Nothing in the affidavit shows personal bias for or against either of the parties. The most that can be said is that the District Judge entertained an opinion on the legal justification for the suspension. But this plainly is not the same as *animus* against the defendant or affection for or bias in favor of the plaintiff. The authorities above referred to distinguish between fixed opinions as to the law and personal bias, and likewise distinguish between, on the one hand, bias or prejudice which is not personal but which is derived from the background and experience of the Judge, and on the other hand bias which is personal within the meaning of the statute, that is to say, bias which is in favor of or against one of the parties.

The argument of appellant is that an opinion not formed on the evidence constitutes personal bias or prejudice.

This argument is unsupported by the authorities; it would offer a new method of disqualification wholly unnecessary for the proper administration of justice.

The *Craven* case (*Craven v. U. S.*, 22 F. 2d 605) relied on by appellant merely reaffirms the necessity for personal bias. "There is in the affidavit no intimation that prior to the first trial the presiding judge had any bias or prejudice, personal or other, against the defendant. So far as appears, he had never heard of him or his alleged offense" (*ibid.* 607). The *Moskun* case (*Moskun v. U. S.*, 143 F. 2d 129), did not involve any disqualification procedure under the statute. The same is true of the *Ferrari* case (*Ferrari v. United States,* 169 F. 2d 353). In *Schmidt v. United States,* 115 F. 2d 394, the affidavit disclosed that the Judge had expressed an opinion personally prejudicial to the defendant and "personally hostile and antagonistic to him . . . and had assumed the role of a prosecutor" (*ibid.* 398). In *U. S. v. Sixteen Thousand Acres of Land,* 49 Fed. Supp. 645, the Court held that impersonal prejudice resulting from a Judge's background or experience or even prejudice against a particular type of litigation is not prejudice within the meaning of the statute, citing *Price v. Johnson, supra,* decision of the Ninth Court of Appeals. In *In re Beecher* 50 Fed. Supp. 530, no affidavit was presented, the District Court ruled adversely to the affiant's contentions and held that merely making "unfair and uncomplimentary remarks" did not constitute personal bias or prejudice. *Ryan v. United States,* 99 F. 2d 864, held that even where the District Judge expresses the opinion that "sinister forces are at work," and "lurking in the background" of the case, this did not constitute a showing of personal prejudice.

It is true that some of the decisions say that an opinion formed on the basis of evidence in the record is not a "personal" opinion within the meaning of the statute. But none of the cases hold that an opinion formed from sources other than evidence, as for example an opinion derived from the background and experience of the Judge, is for that reason the equivalent of personal bias or prejudice *in favor or against one of the parties.* An opinion may be "personal" to the Judge; that is to say, it may be derived from non-judicial sources and in the course of the judge's personal experience. But this is not the same as an opinion evidencing the judge's personal bias for or against the parties.

It is submitted that the affidavit for transfer of the cause was insufficient.

Conclusion.

Because of the facilities available to appellant, as a producer of motion pictures, the jury was put in a position of the closest intimacy with the facts most vitally in issue. The heart of this controversy centered about the plaintiff's conduct on the witness stand. Not only was the transcript of the plaintiff's testimony put in evidence, but a phonographic recording of the proceedings was played twice in the hearing of the jury, so that all of the sounds of the exact scene were brought alive in the courtroom. More than this, a motion picture film reproducing exactly, in detail, as well as in duration, the plaintiff's entire conduct on the witness stand was exhibited to the jury. It is not possible to imagine any trial which has brought to the jury the living facts concerning which the issues arose as vividly or as authentically as was done in the Court below.

On the basis of that evidence, as well as a full and impartial hearing, twelve jurors acceptable to the appellant unanimously found that the appellee had not violated his contract. The Court, by independent findings, reached the same conclusion. It is respectfully submitted that only the strongest showing of prejudicial error should move this Court from anything other than an affirmance.

Historically the function of the Courts has been to channel the issues and to require their presentation to a jury in such a way as to make it possible to render a calm, dispassionate verdict, cut free from the entangling agitations of prevailing prejudices. The decisions have assumed that twelve citizens, representative of the country, would be more likely to be biased in their consideration of the issues than would the Court. And for that reason Courts have traditionally sought to impress jurors with their duty to render a verdict on the facts and in accordance with the law, without regard to political excitations.

In the present case, had any such existing tendencies operated, they would have operated in favor of appellant. Notwithstanding that, the jury as well as the Court reached conclusions entirely favorable to the plaintiff.

Yet many of the arguments in Appellant's Brief appear to have been made not for their intrinsic merit but in the hope that the arguments would steep the appellee's case in the agitation concerning Communists and Communism. It is as though appellants sought to accomplish with this reviewing Court, in stirring the kettle of hysteria, what they had failed to achieve with the jury.

The position taken by the employer was wholly unprecedented in the history of the motion picture industry; it was based on a tenuous, insubstantial, and concededly shaky construction of a motion picture employment con

tract which surely must have been drawn with wholly different purposes in view. Not only that, but the employer's position represented a drastic *volte face,* without warning to anyone until it was too late.

It should be borne in mind that what the Court was called on to enforce was a property right, that is, a right arising out of a contract. Courts and scholars have long recognized that while political controversies may ebb and flow, in order to prevent serious injury to society, rights arising from contract must be protected. Any other course would invite name-calling and trial by epithet.

The appeal, we submit, is without merit. The proceedings were free from error, and the judgment accomplished substantial justice.

Respectfully submitted,

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